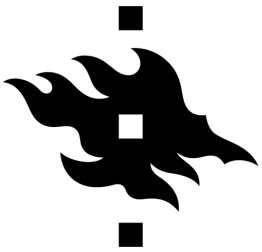

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THE ROLE OF POLITICS IN THE HISTORICAL DEVELOPMENT OF THE CRIME OF AGGRESSION

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Master's Thesis

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Tiivistelmä - Referat – Abstract

This thesis investigates how the legal framework of the crime of aggression reflects the political agenda of the Friend/Self and the Enemy/Other dichotomous distinction, and how has the legal contextual discourse of the crime of aggression historically developed. This thesis endeavours to explore the role of politics in the historical recognition of aggression as a crime in relation to the cases of the International Military Tribunal of Nuremberg and the 2010 Kampala Conference.

The thesis applies Carl Schmitt's theoretical framework of the Friend/Self and the Enemy/Other as a species of politics that has played a role in the historical development of the legal category of the crime of aggression. The work employs a historical design: 1) focusing on series of legal doctrines within the Nuremberg Tribunal and the 2010 Kampala Conference aiming to explain how political context influenced the legal framework, and 2) annotating how and why structures of legal institutions evolved beyond this.

The international anarchical system relies on political tensions, which depend on ones' independence and freedom. The one who is threatening these principles, the Enemy/Other, is aimed to be contained and possibly defeated by the Friend/Self. To be able to refrain the Enemy/Other, without being categorised as an aggressor, the Friend/Self had to resolve to legal applications to promote and to reaffirm their political objectives in the international legal system. This would legitimize their use of force action without being condemned for committing the crime of aggression. Hereby, the judicial process becomes politicized.

The Friend/Self and the Enemy/Other politics have led to unequal and discriminatory treatment of states within the international system where the Friend/Self represents the sovereign, who decides on the exception. This has inscribed an anomie within the legal category of the crime of aggression where politics can steer the legal debate. The Nuremberg Tribunal that "recognize[d an enemy] as the enemy" in the legal doctrine, while in the Kampala Conference the *jus belli* power was transferred into alliance system – the Security Council. This gave it the competence to determine a state act of crime of aggression before referring the case to the ICC. The amendment to Article 8 *bis*(2) adopted a generic formulation on the crime of aggression allowing cases of insufficient in gravity to manifest. Due to absence of the threshold clause in paragraph (2) it left the state act of crime of aggression ambiguous in its formulation, and it diverted the responsibility from the state to the individual (paragraph (1)). Thus, the individual is condemned, while the state remains within the legal norm. This allowed the Friend/Self and the Enemy/Other politics to prevail, which solidified the dichotomous politics within the legal category of the crime of aggression.

The historical development of the crime of aggression doctrine has politicized through the Friend/Self and the Enemy/Other disposition by the powerful states. This has led to wars/conflicts that were waged in the name of humanity in order to preserve peace, order, and security in the international system (UN Charter Article 1). This has inscribed politicized system that entails 'corruptive' nature in waging wars/conflicts. To prevent this from happening paragraphs (1) and (2) of Article 8 *bis* would need to be reversed in order to serve more justice. This would allow states to become held responsible for the crime of aggression – as the political leaders act on behalf and represent the state. As this is not the case, the development of the 2010 Kampala Conference demonstrates that power politics will prevail and even deepen the escalation of violence, i.e. crime of aggression, through legal means; even though law is perceived to constrain politics through legal constitutional boundaries.

Avainsanat – Nyckelord – Keywords

Crime of Aggression, The International Military Tribunal of Nuremberg, The 2010 Kampala Conference, ICC Article 8 *bis*, The Friend/Self and the Enemy/Other Distinction, The State of Emergency

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INTRODUCTION

In the middle of the 16th century, Vittoria attempted to determine the international legal doctrine on wrongfulness of conducting aggressive war. He wrote that war was only justified when "retaliating the wrongful act"[1] conducted by someone else. Hugo Grotius shared similar opinion[2]. For him fair and permissible war was only possible in response to a violation of law. In other words, in the name of self-defence: "In case of an attack on people by open force, which would appear to be unavoidable and carry danger to life, a war is permissible allowing even killing of the assaulter"[3]. However, as Ayala argues, not against the "heterodox, just because they appear to be heterodox, even by the order of the imperator or the pope"[4]. In any case, despite of the number of wars that took place before 1945, it was only after the Second World War – that had estimated deaths of 60 million people (20 million soldiers, 40 million civilians)[5] – that the first attempt of codifying the definition of the crime of aggression concept in the international legal doctrine took place.

The atrocities committed in the Second World War led to the establishment of the International Military Tribunal of Nuremberg in accordance with Article 1 of the London Agreement signed on the 8th August 1945 by the United States of America, the French Republic, the United Kingdom, and the Soviet Union[6]. Article 1 set up a novel institutional Tribunal for the purpose of the trial and punishment of the major war criminals of the European Axis countries for any following crimes committed – the crime against peace (Article 6(a)), war crimes (Article 6(b)) and crime against humanity (Article 6(c))[7]. This made the Nuremberg Tribunal a temporary institution until war criminals; the responsible individuals for these crimes, of the European Axis

[1] Naumov, et al., 2016: 150
[2] Naumov, et al., 2016: 150
[3] Naumov, et al., 2016: 150
[4] Naumov, et al., 2016: 150
[5] Shaw, 2000: 35
[6] United Nations, 1951: 280, 282; International Military Tribunal of Nuremberg Judgment, 1947: 8, 10
[7] United Nations, 1951: 286, 288; International Military Tribunal of Nuremberg Judgment, 1947: 11

would be condemned. This instance can be viewed as a first attempt towards the codification of the crime of aggression as an 'international crime' in international law, which was legalized in the Charter of the International Military Tribunal of Nuremberg under Article 6[8]. However, despite the horrendous Second World War events and atrocities, the definition and the codification of the crime of aggression were not included into the international criminal law at this time[9].

Another precedent in the codification of the crime of aggression as an 'international crime' can be observed in the case of the Rome Statute of the International Criminal Court (ICC), which was circulated on 17th July 1998, entered into force on 1st July 2002, and amended in 2010[10]. The ICC was established in The Hague to punish the most heinous crimes committed in the twentieth century based on retroactive jurisdiction. The idea of establishing an international criminal justice system re-emerged after the Cold War as the world witnessed another commission of heinous crimes in the territory of the former Yugoslavia 1991-2001 and in Rwanda 1994[11], which went unpunished, while the ICC was under the negotiations at the United Nations. These events undeniably impacted the decision of establishing the ICC in 1998, which is reflected in Article 1 and specified in Article 5 of the ICC statute[12]. Article 1 begins with the expression that the ICC "shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred in [the] Statute, and shall be complementary to national criminal jurisdictions" by covering suspected perpetrators of genocide, crime against humanity, war crimes or aggression, including superiors or military commanders (Article 5)[13].

The ICC did not include it either as such into the international criminal law. As a result, this became the most disputable facet in the ICC. The ICC enlisted other crimes subject to its jurisdiction: the crime of genocide (Article 6), crimes against humanity (Article 7), war crimes (Article 8), and the crimes of aggression (Article

[8] Naumov, et al., 2016: 147
[9] Naumov, et al., 2016: 147
[10] Rome Statute of the International Criminal Court
[11] ICC, 2017: 3
[12] ICC, 2017: 3
[13] ICRC, 2017; Rome Statute of the International Criminal Court Article 1, Article 5

5)[14]. Only, after twelve years, in the 2010 Kampala Conference, in Uganda, would the member states of the ICC gather in order to reach a consensus regarding the definition of the crime of aggression and its procedural regime that would allow the ICC to exercise its jurisdiction over such crime.

It could be argued that the reasoning behind the non-inclusion of the 'crime of aggression' definition as such into the Charter of the Nuremberg or the ICC at the time lies in the nature of law. John Yoo defines law as 'lawfare', which for him is the continuation of politics that yields conflict/war[15]. This he justifies by linking to the Clausewitzian dictum – 'war is politics by other means'[16]. With this law is referred as a 'war tool', which Luban characterizes as "species of the politicization of law"[17]. Hereby, law becomes infiltrated by politics, i.e. a political 'weapon' or tool for nation-states to obtain and to further their political objectives through legal means, in order to secure their interests in the international anarchical system. Thus, the legal framework would be used by states to boost their comparative advantage, in order to maximize their hegemonic power in the international arena.

As a result, law can be perceived to act as a 'war or strategic tool' as Sloan annotates "war [being] an instrument to achieve political goals"[18]. States use law to secure their – the Friend/Self – national interest in prolonging of their 'way of life' and survival. This will further ensure the hegemony of the Friend/Self nation-state in the international arena where the Enemy/Other threats by imposing its own vision of the 'way of life' on the Friend/Self. The more law becomes penetrated with the Friend/Self and the Enemy/Other political distinction, the more law operates as a 'war and/or strategic' instrument through which 'power struggle' manifests between different states and different alliance systems. Consequently, a hypothesis could be posed that the more a state-unit or an alliance has control over legal system, the more secured position the state or the alliance system has in ensuring their 'way of life' prolonging in the international anarchical system.

However, by emphasizing the 'way of life' tends to render Carl Schmitt's the Friend/Self and the Enemy/Other dichotomous political distinction. This dichotomous

[14] ICRC, 2017; Rome Statute of the International Criminal Court Article 5
[15] Luban, 2011: 1
[16] Luban, 2011: 1
[17] Luban, 2011: 2
[18] Sloan, 2012: 1

distinction was recognized by the Bush Administration after the 9/11-incident stating: "Every nation, in every region, now has a decision to make, either you are with us, or you are with the terrorists"[19]. This relates to the Huntingtonian notion of 'Clash of Civilizations' where the fundamental source of conflict is the division among humankind through culture[/cultural factors][20]. Due to the difference in 'cultural factors' upheld by the nation-states, this resulted in development of the Friend/Self and the Enemy/Other politics. The concept of the Friend/Self and the Enemy/Other has always persisted in the human history. However, this dichotomous notion has been used as a 'war and/or strategic tool' to exaggerate the difference between the nation-states, especially, during the conflict times to highlight the division of cultural factors existing between different civilizations. This led to the problem where the state violence, also referred as the state terrorism or more appropriately in legal terms as the crime of aggression, becomes legitimized based on the inherent self-defence clause (UNC Article 51) and protection of own political independence and territorial integrity (UNC Article 2(4)). As states are perceived to be the ultimate protectors of their nations, they are rarely identified and/or condemned as terrorist/violent states[21]; consequently, they are usually represented as the Friend/Self.

One could argue, if the Friend/Self superiority is taken for granted, thus is its violence leading to the exclusion of the Enemy/Other's inter-subjectivity by stripping it from the legal status[22]. Hereby, the Enemy/Other becomes dehumanised through process of legal exception categorization where the Enemy/Other's legal rights are eliminated, and, subsequently, the Friend/Self daily violence/terrorism/aggression is deflected on the Enemy/Other violence[23]. This has led to the entrenchment of Friend/Self and the Enemy/Other political agenda into the legal framework, which subsequently reflects the construction of the social reality, which is affected by "cultural and civilizational identity differences" [24]. This has led to unequal and discriminatory treatment of states within the international anarchical system through the international legal system where the Friend/Self is defined as 'exceptional'

[19] Evans, 2005: 222
[20] Huntington, 1993: 22
[21] Zeidan, 2004: 495
[22] Gunning, 2007: 371
[23] Gentry, 2015: 365
[24] Gentry, 2015: 364; Huntington, 1993: 25

granting it legitimacy for inherent self-defence, i.e. use of violence, as a victim that suffered a wrongful act by the Enemy/Other, i.e. aggressor.

The Self and the Other distinction, also branded as the 'Friend and Enemy' dichotomy, was formulated by Carl Schmitt in his psychological concept of the 'State of Exception'[25]. This framework of the 'Exception' studies the political process involving the reconstruction of the 'Self and Other' distinction through bureaucratic legal means. In this particular distinction of the 'Self and Other', the two opposing groups are set to contradict each other where one group resembles the 'legal norm' and the other 'the legal exception'. Alternatively, in some cases, the two opposites – the Friend/Self and the Enemy/Other – could also be viewed at the same time both the legal norm and the legal exception, depending on the perspective that is taken. This perspective depends on the cause that each state party is triggered to fight for their 'way of life'-values; either securing their survival by extending their hegemonic influence territorially, or by repelling the foreign invasion and its oppression of their nation-state. The perspective on who is classified as the Friend/Self and the Enemy/Other depends on the sovereign, as Schmitt notes: "The sovereign is he who decides on the exception"[26]. According to Schmitt, sovereignty is granted to the victorious party to the conflict for the purpose to apply means of coercion and the use of force, in order to uphold security, order, and peace (UN Charter Article 1) for the purpose to endorse "humanity [as] intensive political meaning"[27].

Thus, in the case of the 'State of Exception', such as the Second World War (1939-1945), the Global War on Terror, and other majorly global conflicts, "unlimited authority [is prescribed that] suspends the entire existing order. In such a situation, it is clear that the state remains, whereas law recedes, [as] the exception is different from anarchy and chaos, [while] order in the juristic sense still prevails even if it is not of the ordinary kind"[28]. Even though, an extraordinary situation such as war suspends law, yet the juristic order prevails, despite it being an extraordinary type[29]. Schmitt posits, that there is no norm that cannot be applied to chaos; instead law becomes 'situational law' where the sovereign applies monopoly power to decide

[25] Schmitt, 1996: 27
[26] Schmitt, 1985: 5
[27] Luban, 2011: 7
[28] Schmitt, 1985: 12
[29] Schmitt, 1996: 47

regarding order[30]. For instance, in the case of the Charter of the International Military Tribunal of Nuremberg or the Patriot Act 2002. As a result, the exception, same as the norm and the decision, remains within the framework of the juristic, as every norm demands a daily framework according to which it can operate on daily life basis, because norm requires a homogenous medium[31].

Subsequently, it is essential to understand the role of politics in the historical understanding of aggression as a crime, as it tends to violate the ancient and fundamental principle of justice – the fair trial principle[32]. The fair trial principle derives from the humanitarian understanding that determines the rights and obligations of any criminal charges against a person is a basic right for equal protection (Universal Declaration of Human Right Article 10). One could argue that politics yield arbitrary state behaviour that is legitimized in the legal framework, which allows seizing the sovereign power by declaring the exception without actually claiming sovereignty. This tends to manifest state violence that is known as state terrorism or in legal context, the crime of aggression.

According to Zeidan, "state terrorism[, i.e. crime of aggression,] is unlawful use of force or repression penetrated or sponsored by a state against some or all of its citizens, based on political, social, racial, religious, cultural discrimination, or against the citizens of a territory occupied of annexed by the said state, or those of neighbouring or distant countries"[33]. States avoid the terrorist label by invoking the excuse of 'self-defence' (UN Charter Article 51), which reflects security, order and peace (UN Charter Article 1). This has led to the protection of state's sovereignty (UN Charter Article 2(4)) by international law through disregarding their terrorism practice[34]. States are rarely identified and condemned as terrorist states or the ones committing the crime of aggression. Consequently, terrorism or crime of aggression has become to be perceived as used against the state[35]. State terrorism or crime of aggression is dangerous as it yields more violence.

However, more violence tends to be generated through the Friend/Self and the Enemy/Other framework that is exercised by powerful states. This framework

[30] Schmitt, 1985: 13
[31] Schmitt, 1985: 13
[32] Weber, 2017
[33] Zeidan, 2004: 495
[34] Zeidan, 2004: 495
[35] Zeidan, 2004: 495

juxtaposes the two opposing sides against each other by highlighting the cultural and ideological differences between nation-states[36]. Especially, in the case of the state of emergency, such as the Second World War (1939-1945), the Global War on Terror, and many other global conflicts generate the state of exception measures. They leave 'gaps' in law allowing politics to enter and engrave its marks in the society where extraordinary order in the juristic sense prevails[37]. As a result, the sense of anomie – the Friend/Self and the Enemy/Other – becomes engraved as part of legal context, which yields more violence by legitimizing the Friend/Self use of force, i.e. crime of aggression, while condemning the Enemy/Other's use of force.

This is especially evident in the case of the International Military Tribunal of Nuremberg where the Allied Powers pushed a political agenda through the Charter of the International Military Tribunal of Nuremberg that legitimized the existence of enemy, while in the 2010 Kampala Conference the adopted broad definition of the crime of aggression reflected the political agenda of the minority of the powerful delegations by apprehending the majority. This demonstrates how the sovereign who obtains the characteristic of exception as unlimited authority creates extrajudicial order in the (international) community as the one "who decides on the exception"[38]. Thus, it is essential to distinguish how powerful states retain their power politics in the international affairs through legal framework, which legitimizes conduction of violence of the Friend/Self, while condemning the Enemy/Other for using it. At the same time, this creates an unequal hierarchical order among the states, which can yield more violence as certain states are in a position to wage legalized wars in the name of humanity. This is due to their realist ambitions in pursuit of their political objectives[39]. This demonstrates that power politics will prevail and even deepen the escalation of violence, i.e. crime of aggression, through legal means, even though law is perceived to aim to constrain politics through legal constitutional boundaries[40].

[36] Huntington, 1993: 22
[37] Schmitt, 1985: 12
[38] Schmitt, 1985: 5
[39] Luban, 2011: 7
[40] O'Brien, 2011: 2

DEBATE STRUCTURE

Within the mainstream thought on the crime of aggression phenomenon, this thesis will discuss **"The role of politics in the historical development of the crime of aggression"**. The work will use Carl Schmitt's psychological approach of 'the Friend/Self and the Enemy/Other' distinction as one of the species of politics that has played a role in the historical development of the legal category of the crime of aggression. The purpose is to answer the following research question:

1) How has the definition of the crime of aggression developed through out the history from the International Military Tribunal of Nuremberg to the 2010 Kampala Conference?

To help to answer the main research question the following sub-questions will be observed along the way:

2) How do powerful states utilize the Friend/Self and the Enemy/Other framework to advance their political objectives through legal means?
3) How does the distinction between the Friend/Self and the Enemy/Other support the justification of the use of force through the legal framework?

Chapter 1 will start with by discussing the methodological approach to this thesis. Firstly, a research perspective will be outlined. It incorporates a mainstream argument on the Friend/Self and the Enemy/Other as a species of politics, which reflects a realist perspective in the legal sphere. Even though the legal sphere endorses a realist approach, yet it covers its holistic posture by an ethical stance within the institutions and structures that we are part of in the international anarchical system, such as the Charter of the International Military Tribunal of Nuremberg and the 2010 Kampala Conference. These legal structures adapt Carl Schmitt's analogy of the Friend/Self and the Enemy/Other as process of politicizations. Secondly, this section will evaluate Carl Schmitt's concept on law and juristic order, and their linkage to the Friend/Self and the Enemy/Other dichotomous politics. The dichotomous politics intensify the difference between values upheld by different civilizations, which further exaggerates

and intensifies the conflict by categorizing humankind between the legal norm and legal exception. This will be discussed in relation to the sovereign, as Schmitt posits: "The sovereign is he who decides on the exception"[41].

Chapter 2 will discuss the significance of the establishment of the International Military Tribunal of Nuremberg in the development of the crime of aggression. This was one of the first attempts in history when the crime of aggression was formulated in the legal language, enforced and exercised where "politicians and military officers were held accountable for the crimes of a state in which they had played a major role. They were neither able to rely on national laws, which legitimized their actions, nor on the orders of the government or their superiors"[42]. This event demonstrated that the victorious Allied Powers defined themselves as the 'Self' by positioning themselves as prosecutors, judges and executioners of the Axis Powers, especially the Nazi German leaders, through the legal doctrines: crime against peace (aggression), against humanity and war crimes. While the defeated Axis Powers were labelled as the Enemy/Other. They were in no position to oppose whatever the Allied Powers demanded. This dichotomous positioning of the victorious Allied Powers and the Axis Powers carrying political objectives shaped the legal framework of the crime of aggression discourse, which is evidenced in the prosecution process that helped to set up the hegemonic leadership of the Allied Powers in the international system in the future.

Chapter 3 will discuss the 2010 Kampala Conference as a future perspective for criminalizing the act of the crime of aggression. However, two views exist on this perspective. On the one hand, the act of criminalizing the crime of aggression is assumed to operate as an attempt to stop the Friend/Self and the Enemy/Other politics from interfering with the legal realm. The purpose of criminalizing the crime of aggression is to remove the sovereign power of exercising the Friend/Self and the Enemy/Other politics by individual states, which can lead to the formation of an alliance system if states seem to share similar interests and values. Subsequently, the newly adopted amendments in Article 8 *bis* strives to stop the dichotomous grouping of the parties between the Friend/Self and the Enemy/Other involved in the conflict. Leading to the separation and independent functioning of the legal realm from political realm as well as law not being used for military purposes to perpetuate acts

[41] Schmitt, 1985: 5
[42] Nees, 2015

of violence, which would be justified on moral grounds. On the other hand, there is an assumption that the newly adopted definition on the crime of aggression in the Kampala Conference created a 'boomerang effect' where the powerful states, which represented the minority, overran the formulation of the crime of aggression. As a result, it led to a continuation of the Friend/Self and the Enemy/Other politics in the newly adopted legal framework. This process will be observed through three arguments: 1) The Article 8 *bis* is not compatible with the United Nations Charter – self-defence clause and Chapter IV – as it gave the Security Council the sovereign power to determine the existence of the crime of aggression before the ICC could exercise its jurisdiction over the crime of aggression; 2) The definition of the crime of aggression (Article 8 *bis*(2)) adopted a generic formulation, which the majority of the delegations feared that newly adopted juristic order under the Article 8 *bis*(2) will not stop the manifestation of the Friend/Self and the Enemy/Other politics within the legal framework, instead allows it to flourish by creating a new situation of exception[43]; and 3) The threshold clause (Article 8 *bis*(1)), where the paragraph (2) of Article 8 bypasses the state responsibility by diverting it back to paragraph (1) that establishes an individual responsibility allowing the continuation of the Friend/Self and the Enemy/Other politics to be conducted by the powerful states, as Security Council appears to be blocking the case to be referred directly to the ICC.

Finally, conclusion will elaborate on the historical development of the crime of aggression definition in the International Military Tribunal of Nuremberg to the 2010 Kampala Conference. Firstly, it will establish a linkage between the politics that the powerful states foster within the legal framework. Secondly, it will answer as how this process was reflected in these two cases. More particularly, as how the powerful states utilize the Friend/Self and the Enemy/Other framework to advance their political objectives through legal framework, and how the distinction between the Friend/Self and the Enemy/Other support the justification of the use of force, i.e. crime of aggression, through the legal framework. Lastly, the conclusion will provide a suggestion, as how should the legal framework be formulated so that it would serve more justice in the international system in relation to all states within the international community.

[43] ICC-ASP/6/20/Add.1, 2010: 4

CHAPTER 1: METHODOLOGICAL APPROACH

RESEARCH PERSPECTIVE

This thesis endorses the Friend/Self and the Enemy/Other as species of politics that reflects a realist approach in a legal sphere. Politics can also be seen to put forward an ethical statement to institutions and structures that embed sets of values that we become part of in the international anarchical system. Example of this are the Charter of the International Military Tribunal of Nuremberg, the 2010 Kampala Conference, the Charter of the United Nations, and many more multilateral institutions both agreements and coalitions. Though not particularly obvious these structures do adapt values that ingrain and shape the international affairs through process of the Friend/Self and the Enemy/Other politicization. As a result, according to Frost, in the "plural world there is no overarching set of values[, i.e. global politics], to which all would subscribe to [, thus] there is no clear goal towards which diverse states, nations, and people are moving to"[44]. This leads where states implement their preferred set of values in the world, which is likely to face sooner or later a resistance both internally and externally due to wide range of different ethical, religious, and cultural codes[45]. The difference on politics, which enshrines set of values, generates a dispositional conflict where two opposing ideologies collide. This difference, according to Huntington, is usually due to the cultural and civilizational differences, which creates a division among humankind[46], which assists to develop the Friend/Self and the Enemy/Other dichotomy by creating a sense of anomie in politics. E. H. Carr warns of the dangers of attempting to impose 'own set of idea', i.e. values, on how the world ought to be, which tends to generate a struggle between the 'life and death'[47].

The dichotomous nature of the Friend/Self and the Enemy/Other politics is shaped by our own self-interest where values, which is composed of human society and morality, are confined to the state that steers a political arena filled with conflicts

[44] Frost, 2003: 478
[45] Frost, 2003: 478
[46] Huntington, 1993: 22-23
[47] Frost, 2003; 478; Frost, 2001: 5

between self-interested states where the great powerful states dominate everybody else[48]. Thus, all international agreements are provisional and conditional to the states' will[49]. In case states' national interests are under threat, they have to be prepared to sacrifice their international obligations on the altar of its own self-interest, if two states come into conflict with each other. Therefore, treaties and other agreements, conventions, customs, rules, laws, etc. between states are simply expedient arrangements that can and will be set aside if they conflict with the vital interests of states. The only responsibility of the states people, according to Machiavelli, is to advance and to defend the national interest[50]. Politics is shaped by our own self-interest, which, according to Frost, we perceive as normative idea of our entitlement[51]. As a result, this has steered a competition over supremacy of one's ethics over other by constructing hierarchical ethics in international system, which has generated the Friend/Self and the Enemy/Other politics legitimizing one's use of force while condemning the other.

Using the realism analogy, it can be posited that the Friend/Self and the Enemy/Other politics operate as an incentive for states to pursue their self-interests, which allows them to apply coercive power to guarantee their survival in the international anarchical state system by seeking comparative advantages that would boost the state's power politics. The states, controlling power politics in the international system, will position itself as hegemon but also, according to Schmitt, inscribe sovereign status allowing the state to use coercive means of use of force to maintain peace, order, and security (UN Charter Article 1) in the name of humanity; even if it means resorting to an act of aggression[52]. Consequently, global conflict waged in the name of humanity become labelled as humanitarian interventions. For Coady, humanitarian intervention possesses a coercive power that is regulated through international law and the Charter of the United Nations[53]. It is good to question how it is possible to wage an aggressive war for humanitarian purposes, or can aggressive war be humanitarian?[54]. States become alert against possible danger

[48] Jackson and Sorensen, 2010: 60
[49] Jackson and Sorensen, 2010: 60
[50] Machiavelli, 1984: 59-60
[51] Frost, 2001: 2
[52] Luban, 2011: 7; Vinx, 2014
[53] Coady, 2002: 17
[54] Coady, 2002: 17

that might undermine them or put them in disadvantageous position. The aim is to override the enemy, impose the winner's will and power on the enemy, and subjugate the enemy under the winner's control where, according to Kant, political prudence of a state is put in the continual increase of its power by whatever means to compel the other to do his will[55]. This analogy of ethical stance in politics is echoed in Carl Schmitt's notion of the Friend/Self and the Enemy/Other when he builds up his argument about law and juristic order.

ANALYSIS OF SCHMITT'S CONCEPTS

According to Schmitt, in order for law to be effective there has to be an authority that decides how to apply general legal rules to concrete situations and how to deal with problems of contested interpretation or under-determination[56]. Usually authority is perceived to be a state, a government, or an international institution that exercises the sovereign power – the one "who decides on the exception"[57]. However, in this transnational system authority can also derive from unilateral or multilateral agreements, such as the Charter of the United Nations, the Charter of the Nuremburg, or the 2010 Kampala Conference that reached a consensus on the newly adopted amendments to the Rome Statute. Compared to the state and government authority, which exercises the sovereignty, the content of the law does not determine itself as who has the capacity and competency to interpret and to apply it, i.e. sovereignty, unless otherwise stated in it, e.g. the Charter of the United Nations Article 24 sets up a functions and responsibility of the Security Council to maintain international peace and security, and, in order to protect these principles, the Security Council is granted powers laid down in Chapters VI, VII, VIII, and XII[58], or as in the 2010 Kampala Conference delegations expressed that under the Charter of the United Nations Article

[55] Kant, 1999: 318
[56] Vinx, 2014
[57] Schmitt, 1985: 5
[58] Charter of the United Nations Article 24 (a)(b)

39 the Security Council will have exclusive competence to determine a state act of aggression[59], which would give the Security Council the sovereign power over law.

Otherwise, the social attitudes of the social groups, e.g. alliance system or the (international) society, affect the sovereign authority, e.g. an international organization, the World Jewish Congress, the powerful and secretive one made sure that the Germany's extermination of the Jews was a primary focus of the trials, and that the defendants were punished for their involvement in that process[60] as this posed a threat for the racial extinction through indiscriminate and disproportionate conduction of the use of force – crime of aggression. This kind of attitude tends usually to reflect the vision/opinion of the powerful when determining the development of the global politics. As a result, one could argue, it allows an arbitrary behaviour of the states to manifest in the international system. Schmitt describes this as dictatorial state, which is like an absolutist sovereign, that claims power to decide on the exception, but it does not claim to be the sovereign[61]. For instance, in the case of the International Military Tribunal of Nuremberg the Allied Powers seized the sovereign power by declaring the exception without actually claiming sovereignty. Here the sovereign obtains acts as an exception that has unlimited authority, at the same time suspending the existing order by replacing it with the new one[62]. Schmitt distinguishes the exception as being different from anarchy and chaos, however, despite of exceptional measure the order in the juristic sense does still prevails even if it is not of the ordinary kind[63]. This is due to the existence of the state as being undoubted proof of its superiority over the validity of the legal norm[64]. Subsequently, state suspends the law in the state of exception on the basis of its right for self-preservation. As a result, the state of exception measures will extend the state's coercive force as a means and methods to ensure its survival in the international anarchical state system by prescribing it the natural/inherent right for self-defence as outlined in the Charter of the United Nations Article 51[65].

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[59] International Criminal Court, 2010: 124
[60] Weber, 2017
[61] Vinx, 2014
[62] Schmitt, 1985: 12
[63] Schmitt, 1985: 12
[64] Schmitt, 1985: 12
[65] Schmitt, 1985: 12; Charter of the United Nations Article 51

As the nature of the international system is plural it consequently leads to the struggle of the power politics as there is no overarching set of values to which everybody would subscribe to[66]. According to Schmitt, this intensifies the degree of power politics by generating the Friend/Self and the Enemy/Other borderline concept, which depends on the union or the separation of the values[67]. The split between values depends on the nature of being different or alien, but this can only be judged by the participants in the particular situation, so that 'objective' nature would define the distinction between the Friend/Self and the Enemy/Other[68]. This dichotomous disposition is only possible though the neutral domains, e.g. religion, linguistic, ethnic, economic, culture, and education, which do not penetrate the state and politics, i.e. the legal content through direct means as such[69]. However, the neutral domains do shape the values of the political sphere. In other words, the legal content, which embeds the sovereign will, as noted by Nye, rests on the behavioural and psychological attitudes[70]. It can be argued that these values act, as the fundamental constructive basis for the nation-state building in the international affairs as they construct the identity of the nation-state, which is later rendered into the legal content[71].

The Friend/Self and the Enemy/Other concept can be understood in private individualistic sense as a psychological expression, which can be converted into collective sensation, i.e. alliance system[72]. In this case an alliance system, which is composed of states that share similar visions and values, will unite forming a 'collective' that will steer the international political power struggle agenda through the Friend/Self and the Enemy/Other dichotomy. Consequently, these 'collectives' trigger a conflict by creating a dichotomy between two different polarities. According to Huntington, the fundamental source of conflict in the 'new' world will not be primarily ideological or economic[73]. Instead, the great division among humankind and the dominant cause of conflict will be cultural, where nation states remain the most

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66 Frost, 2003: 478
67 Schmitt, 1996: 26
68 Schmitt, 1996: 27
69 Vinx, 2014; Schmitt, 1996: 22
70 Nye, 2004: 5
71 Vinx, 2014
72 Schmitt, 1996: 27
73 Huntington, 1993: 22

powerful actors in the world affairs, but the principal conflict of global politics will occur between nations and groups of different civilizations[74]. These values form and uphold civilizations, i.e. nation-states in the international affairs, but at the same time they juxtapose each other. It can be stated that values tend to construct ideologies of the nations and civilizations, which then act as a source of conflict. The difference created between civilizations through values allows the legal system of the nation-state to adopt a peculiar legal identity, which, according to Schmitt[75], tears civilizations and societies apart by producing violence between the Friend/Self and the Enemy/Other categories.

Subsequently, the sovereign's decision, who may appear as an independent state but also as an alliance system, will have a greater impact on ideologically torn societies[76]. This is due to the war strategy that presupposes that the political decision has already been made as 'who is the enemy'[77]. The International Military Tribunal of Nuremberg obviously embeds arbitrary behaviour allowing the Friend/Self and the Enemy/Other political agenda to manifest within the international political and legal agenda in persuasion of their self-interests by prosecuting the Axis Powers. In order to survive in the international anarchical system human life depends on political tensions, because politically united people, i.e. political entity, fight for existence, independence, and freedom, thus the goal is to defeat and possibly to defeat the Enemy/Other[78]. Realism theory would term it, a survival of the fittest.

According to Thucydides, the 'political tensions' or 'survival of the fittest' advances the idea that the states and the alliance systems, which are composed of states, are political animals/'forums' that are highly unequal in their powers and capabilities to dominate others and to defend themselves. This is very evidential in the case of the Nuremberg Tribunal, where independent states formed an alliance in order to be able to "recognize [an enemy] as the enemy"[79], while in the 2010 Kampala Conference, the power politics of the minority overpowered the majority when consensus was forged over the crime of aggression definitional formulation. Therefore, both large and small powers have to adapt a given reality of unequal power

[74] Huntington, 1993: 22
[75] Vinx, 2014
[76] Vinx, 2014
[77] Schmitt, 1996: 34
[78] Schmitt, 1996: 35
[79] Luban, 2011: 9

and conduct themselves accordingly in order to survive and prosper[80]. If a state fails to conduct itself accordingly, it will place itself in jeopardy, i.e. being categories as the Enemy/Other that threatens the 'way of life' of the Friend/Self. Thus, the main responsibility of the state is to seek the advantages and to defend its own state interests, in order to ensure its survival.

In the case of extraordinary situation, such as war, will suspend law, but the juristic order will prevail, despite it being an extraordinary type[81]. The exception, just as the norm, remains within the juristic framework, as every norm demands a daily framework according to which daily life can continue to operate, because a norm requires a homogenous medium[82]. Subsequently, according to Schmitt, there is no norm that cannot be applied to chaos; instead law becomes 'situational law' where the sovereign applies monopolised power to decide regarding the societal/community order[83]. As in the case of the Nuremberg Tribunal the Allied Powers created the 'situational law' by recognizing the enemy so that it would fit their self-interest, while the 2010 Kampala Conference the powerful minority seized the definitional formulation of the crime of aggression so that it would fit their purpose in the 21st century conflicts. In a situation in which a state of exception exists, sovereignty and dictatorship become fused in the institution of sovereign dictatorship where a new dictator does not defend an already existing constitution, but attempts to create a new one and who does so not by his own authority but in the name of the people[84].

Similar to Thucydides who declares that man is a political animal, Schmitt claims that man is by nature evil and licentious, and thus must be kept in check by a strong state capable of drawing the Friend/Self and the Enemy/Other distinction of there is to be a social order[85]. This thought is parallel to Hobbes and Machiavelli's vision that man is inherently dangerous[86]. As a result, there is a need for strong system that could operate as a tool of control, which would embody preventive detention and control order[87]. For instance, both Australia and the US implemented

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80 Jackson and Sorensen, 2005: 25
81 Schmitt, 1996: 47
82 Schmitt, 1985: 13
83 Schmitt, 1985: 13
84 Vinx, 2014
85 Vinx, 2014
86 Vinx, 2014
87 Deleuze, 1992: 2

counter-terroristic legal measures such as the *Law Enforcement Amendment Act 2005* and the *Patriot Act 2002*, which allowed the authorities (political sphere) to steer the control over the social sphere[88]. This kind of control resembles what has been done in the case of the Nuremberg Tribunal, where the Allied Powers seized the sovereign power in order to be able to convict the 'dangerous' suspect with criminal charges, while in the 2010 Kampala Conference, the powerful minority – resembling an alliance coalition – overran the definitional formulation of the crime of aggression into their favour.

At the same time this entails legitimacy of the use of force for one side, while illegitimates for the other[89]. However, Schmitt rejects the creation of an international legal order based on a 'discriminating concept of war' what would subject the use of force on the part of sovereign states to substantive criteria of moral legitimacy and external legal control[90]. In the case of the First Word War, Schmitt grants victorious western allies licence for the application of means of coercion and for the use of force of methods of warfare that would have otherwise been considered to be illegitimate in the context of mutual legitimate belligerency[91]. This logic derives from the outcomes of the war, based on which legitimacy of the use of force is granted. Schmitt suggests that there is transference of *jus belli* into an alliance system[92]. This redirects the dichotomous sense of the Friend/Self and the Enemy/Other from individualistic political community focus into the communal political community – alliance system – where the use of force can be exercised at the international scale, rather than on the local level. In the case of international conflict, the unified political alliance communities, e.g. the Allied Powers or the Axis Powers during the Second World War, which shared common political goals – i.e. values – regarding the international legal order in international affairs, would form the political authority, and, thus, uphold juristic order that would embed norms according to which daily life operates[93].

[88] McCulloch and Pickering, 2009: 630
[89] Vinx, 2014
[90] Vinx, 2014
[91] Vinx, 2014
[92] Schmitt, 1996: 57
[93] Schmitt, 1985: 13

CHAPTER 2: THE INTERNATIONAL MILITARY TRIBUNAL OF NUREMBERG

Although the build-up to the Second World War had begun as early as 1933, the date on which the conflict started is most often considered to be the 1st of September 1939; it would last until August 1945[94]. The Second World War was a war of rapid movement. The War saw major military campaigns in regions such as the Pacific and the Far East, in North Africa and deep in the heart of the Soviet Union as well as in Central and Western Europe and the Atlantic[95]. Since the hostilities were scattered across different regions, the atrocities committed during the World War Two were not limited by geographical locale, i.e. the events were scattered across the globe. This was one of the historical instances when armed conflict hostilities, due to an absence of geographical location, became international, involving the vast majority of the world's countries[96].

The far-reaching effects of the conflict entailed prosecutorial response to international war crimes committed by Nazi Germany, both at the national and international levels. To punish the aggression and atrocities committed by the Axis Powers, the Allied Powers established the International Military Tribunal of Nuremberg. The Nuremberg Tribunal was the first international tribunal in history set up with the purpose to prosecute the high-ranking Nazis, who paved the way for the alleged commission of all the crimes, such as the crime against peace, against humanity and war crimes of that time[97]. This incident legitimized and utilized the legal provision of the crime of aggression for the first time in history over the trials that were held during the period of the 20th November 1945 and 31st August 1946[98]. However, the Nuremberg Tribunal was temporary measure established with the

[94] Shaw, 2000: 11; Lowe, 2005: 104
[95] Lowe, 2005: 89
[96] Roosevelt, Churchill and Stalin, 1943: 834; Roosevelt, Churchill and Stalin, 1943: 2
[97] International Military Tribunal of Nuremburg Judgment, 1947: 174-182
[98] United Nations, 1949: 6

purpose to prescribe justice for those who committed the crime of aggression in the World War Two.

The Nuremberg Tribunal ended up violating the ancient and fundamental principle of justice[99] – the fair trial principle under which a person has a basic right for equal protection (Universal Declaration of Human Right Article 10). Subsequently, this event demonstrated that the victorious Allied Powers defined themselves as the 'Self' by positioning themselves as prosecutors, judges and executioners of the Axis Powers, especially the Nazi German leaders, through the legal doctrines for committing crime against peace (aggression), against humanity and war crimes. While the defeated Axis Powers were labelled as the Enemy/Other, where they were in no position to oppose whatever the Allied Powers demanded. This created an unequal perception of the international actors in the international system. Here the Allied Powers were seen as the Friend/Self-serving justice by advancing morality in the international arena, while the Enemy/Other was perceived as evil, i.e. immoral, who spread death, violence and brutality, which resulted in the 'collective trauma' and 'collective anxiety'[100].

This created a one-side representation of the actors at the international forum of the Nuremberg Tribunal. This can be explained through Schmitt's analogy where the victorious party was granted with the sovereign power that decides on the exception. Consequently, the victorious party being entitled to apply means of coercion and use of force, in order to uphold the international principles of the peace, order, and security in the name of humanity[101]. Thus, the Allied Powers were positioned as sovereign representing the superior and moral actors in the international system, while the Axis Powers were seen as inferior and immoral actors who committed horrendous crimes. This gave explicit and authoritative judicial legitimacy to the Allied Powers to create charges for this special occasion, in order to exterminate the perpetrators of the Holocaust[102].

This logic embedded a moral attitude within a legal domain, which segregated deeds into legal norm and legal exception spheres. This gave the legitimate power for the Allied Powers as the Friend/Self to condemn actors as legal exception in the

[99] Weber, 2017
[100] Edkins, 2003: 2-3
[101] Vinx, 2014; Luban, 2011: 7
[102] Weber, 2017

international anarchical system. As a result, this advanced the sense of morality in the international system where the Friend/Self symbolizes the higher both political and legal justice in the international system by becoming labelled as the legal norm. For Schmitt, the self-declaration of the Friend/Self as the legal norm was only possible for the Allied Powers as they acted on behalf of the humanity aiming to preserve peace, order, and security[103]. This procedure took place for the first time in the Prior 1943, followed in the Moscow Declaration 1943, and, finally, in the London Agreement 1945. According to Schmitt, this is possible to achieve only by seizing the power of sovereignty, which automatically will assign itself the Friend/Self label – which will decide on the exception[104]. Schmitt describes this process as where the sovereignty and emergency powers merge together forming basis for a strong executive power unhampered by constrains of legality[105]. This has led to a scenario where the sovereign, the Friend/Self, is positioned simultaneously within the legal framework and outside it as Agamben describes it: "exterior to the normally valid legal order"[106]. As a result, the Allied Powers positioned themselves as the prosecutor, judge and executioner of justice by acquiring executive and legislative powers simultaneously representing the morality within the international system though the legal framework. This, at the same time, excluded the Allied Powers from being prosecuted for the use of coercion and methods of force of warfare against the Axis Powers, which would under other circumstances be considered illegitimate act[107].

Furthermore, it can be argued that, from the Allied Powers perspective by acting as the executive and legislative powers they aimed to preserve the "life form" [108], i.e. the 'way of life'. While the Axis Powers tried to eliminate it, i.e. they threatened the 'way of life' of the Allied Powers. In other words, there was a 'clash of civilizations' to borrow Huntington's terminology, but in a 'power struggle' sense as realists posit. The end result of the 'power struggle' would entail establishment of the victorious the Friend/Self's hegemonic ruling order globally as the only moral system governing the international affairs both politically and judicially.

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[103] Vinx, 2014; Luban, 2011: 7
[104] Schmitt, 1985: 5
[105] Vinx, 2014
[106] Agamben, 2016
[107] Vinx, 2014
[108] Schmitt, 1922: 27

By witnessing the heinous crimes committed by the Nazis against Jews, gypsies, socialists, communists, homosexuals, mentally ill, Soviet prisoners of war, freemasons, Jehovah's, witnesses, Romani, and disabled it can be argued that Hitler saw these categories as 'plague', inferior, to the German racial superiority, which represented an obstacle to Hitler to become the hegemonic power ruler in the international anarchical system[109]. The Allied Powers saw this as a threat to international peace, order, security, and to their 'way of life', which could be paralleled to the analogy that President Bush posited after the 9/11-incident: "Our way of life, our very freedom came under attack"[110].

However, this can also be viewed in reverse, the Axis Powers, perspective. Hitler argued in his *Mein Kempf* book that the German race was on the verge of historical and political extinction against the forces of communism and the Jewish phenomenon[111]. Hitler saw the German 'way of life' being under threat by other groups that existed in the world. In order to protect Germany from extinction and against foreign threat and invasion Hitler adopted aggressive politics, as the Allied Powers perceived it. This kind of approach created two different ideologies, which clashed causing blaming and victimization of each other. Both approaches aim to claim the sovereign power to decide on the exception (the Other/Enemy) and the faith of the 'life form'.

THE SECOND WORLD WAR – GERMANY'S AGGRESSIVE POLITICS

In January 1933, after Adolf Hitler became the Chancellor of Germany, he envisaged two types of goals for the new world order – short-term and long-term goals, in order to make Germany a great power again. All these doctrines – Hitler's aims and political ideologies – were laid down in his book, *Mein Kempf* (My Struggle)[112].

[109] Lowe, 2005: 111, 113; Shaw, 2000: 36-37
[110] McMillan, 2004: 388
[111] Lowe, 2005: 81, 113, 118
[112] International Military Tribunal of Nuremberg Judgment, 1947: 176, 187-188; Lowe, 2005: 112

These goals show the persuasion of states' self-interest where both "power and deception are conduct[ed in Germany's] foreign policy, in order to secure the supreme political value, the national freedom, such as independence" [113] and racial supremacy[114]. This very same conclusion was reached by the Nuremberg Tribunal stating that "war as an instrument of national policy was already a crime based on the General Treaty for the Renunciation of War of 1928 (the Kellogg-Briand Pact)"[115]. It could be posited that both Hitler's goals, which formed Germany's national policy of that time, could be interpreted as crimes.

Long-term goals involved creating a new great power, a Greater Germany. This goal would unite all German-speaking people inside the Reich who lived in Austria, in the borderlands of Czechoslovakia and Poland, and the lost territories of the East[116]. However, there were doubts about whether Hitler intended to go beyond these aims. Firstly, in order to sustain Germany's great power, the latter needed to acquire land by seizing the rest of Czechoslovakia and Poland, and the Soviet Union as far as the Ural Mountains in order to maintain Germany's necessities such as living space, food and industrial supplies[117]. For this purpose, Hitler stated: "National borders are only made by man and can be changed by man"[118]. Secondly, Hitler enforced the 'Final Solution'-policy, which would conduct racial profiling to determine potential harmful individuals that would be categorized depending on their race, ethnicity and religion[119]. His ambitions were already recorded in 1937 in Hitler's Hossbach memorandum where he perceived the Jews as well as Polish and Russians as a threat to the German nation[120].

Short-term goals contained defying the Treaty of Versailles – condemnation of the other nations of Europe and the League of Nations in order to rebuild a mighty new army and air force[121]. Hitler never accepted Germany's defeat in 1918 and the First World War peace settlement conducted in the Treaty of Versailles, in the Hall of

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113 Jackson and Sorensen, 2010: 62
114 Lowe, 2005: 113
115 United Nations, 2003: 30; International Military Tribunal of Nuremberg Judgment, 1947: 220
116 Brody, 1999: 1; Lowe, 2005: 75
117 Brody, 1999: 1; Lowe, 2005: 75-76
118 Lowe, 2005: 75
119 McCulloch and Pickering, 2009: 635
120 Lowe, 2005: 86
121 Brody, 1999: 1

Mirrors at Versailles by the Allied Powers[122]. Germany was not allowed to participate in this peace settlement, having had little choice but to sign the Treaty of Versailles despite the strong objections. Hitler described this kind of peace settlement as 'Diktat' (dictated peace)[123]. He interpreted all of these servitudes as humiliating and unacceptable. In response to the grievances surrounding the Treaty of Versailles, and driven by his own 'lust for power'[124] Hitler became the Fuhrer of Germany, deploying politics of the 'state of exception',

Here the 'state of exception', according to Schmitt, meant establishment of unlimited authority where the suspension of the entire existing order occurred[125]. Thus, Hitler was able to position himself as the sovereign who determined the legal norm (the Friend/Self) and the legal exception (the Enemy/Other). As a result, the state of exception allowed the order in juristic sense to prevail in extraordinary circumstances by upholding validity of the statehood over the legal norm[126]. Furthermore, the state of exception allowed juxtaposing of the Friend/Self and the Enemy/Other dichotomy, which meant the rivalry over hegemony between two different power camps' survival – the Allied Powers and the Axis Powers. As a result, the nature and structure of the state of exception abolished the restrictions and defied the imposed laws and restrictions set by the Treaty of Versailles – e.g. lost territory both in Europe and African colonies, disarmament, reparation, and the War Guilt clause[127] –, which resulted in use of extraordinary measures that led to heinous crimes being committed against peace, order, and humanity, i.e. crime of aggression.

However, mere planning to be criminal, cannot rest on the single declaration of a party government. In the opinion of the Tribunal, the conspiracy must be clearly outlined in its criminal purpose, as it must not be too far from the time of decision and of action[128]. Nonetheless, the events show that the goals set up by Hitler were indeed implemented where Germany committed crime of aggressions against Austria[129], Czechoslovakia, Poland, Denmark, Norway, Belgium, the Netherlands, Luxembourg,

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122 Lowe, 2005: 35
123 Lowe, 2005: 35
124 Morgenthau, 1965: 192
125 Schmitt, 1985: 12
126 Schmitt, 1985: 12
127 Lowe, 2005: 34-37
128 United Nations, 2003: 32
129 United Nations, 2003: 15-16; International Military Tribunal of Nuremburg Judgment, 1947: 191-192

Greece, Yugoslavia, the Soviet Union, and the United States[130]. In the Nuremberg trials, the Tribunal observed that planning and preparation for aggressive war had been carried out in systematic manner[131]. It could be posed that this kind of foreign policy, or goals, conducted by Hitler's Germany aimed at creating a gap and disposition between the Friend/Self and the Enemy/Other. Hitler did not want to be assimilated with other nations on equal footing. Instead, he wanted to create the 'supreme German nation', which would stand above the others[132].

Furthermore, the act of the Treaty of Versailles, according to the classical realist, Morgenthau, could also be understood as the human 'lust' for power[133]. Here the international agreement of the Treaty of Versailles acts as an urge for power that would secure the Allied Powers' political space within the international system as the sovereign Self against the Enemy the Nazi Germany, by downplaying it and labelling it as the aggressor. Thus, the Nazi Germany became labelled as the legal exception by the Allied Powers', which positioned themselves as the Self, i.e. moral actor within the international system, making them the legal norm. Subsequently, these war events split the world into two alliance systems. As a result, each alliance system – the Allied Powers on the one hand and the Axis Powers on the other – could pursue their own personal interests in the warfare by justifying their acts on moral basis.

In both cases, depending on the perspective, the 'lust for power' drives the 'power struggle' between two different power camps, generating the psychological and dichotomous conflict between the Friend/Self and the Enemy/Other – between the German Fuhrer and the Parties to the Treaty of Versailles. Germany appears either as the victim of the war (the Friend/Self) or the losing side of the war (the Enemy/Other), or the Parties to the Treaty of Versailles appear either as the winners of the war (the Friend/Self) or the dictators of the peace (the Enemy/Other). Correspondingly, this could be understood as a struggle for power between two different power systems where whatever the aim might be, power is an immediate goal, which enables to influence the adversary's behaviour.

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130 United Nations, 2003: 15-16, 18-21, 23-26, 28-29; International Military Tribunal of Nuremburg Judgment, 1947: 189, 191-192, 204, 209-210, 213, 215-216

131 United Nations, 2003; 32-33

132 Lowe, 2005: 309

133 Morgenthau, 1965: 192

According to Nye, there are two definitions of power. The first one is ability to influence the behaviour of others to get the outcomes one wants (i.e. soft power), while the second defines power as the possession of capabilities or resources that can also influence the outcomes (i.e. hard power)[134]. Both powers are related, because they are both aspects of the ability to achieve one's purpose by affecting the behaviour of others. However, Gray takes the view on power even further by linking it to politics. For him politics is about the distribution of power, while strategy is about influencing the will of an adversary[135]. In other words, politics produces strategy that emanates power. It could be argued that the Treaty of Versailles embeds strategic objectives that allowed the Allied Powers to pursue outcome one wanted and to boost ones power by overcoming the adversary. For instance, France and Poland's territorial gain of Alsace-Lorraine and West Prussia. These regions contained industrial infrastructure that was essential for Nazi Germany's military development and its power politics as it allowed to advance national security and development, and to pursue political objectives[136]. It can be argued, according to Emmott, that the state's power politics depends on resource availability and its utilization for nation-state building[137]. By confiscating the German industrial complexes through legal means of the Treaty of Versailles and incorporating them into French and Polish territory demonstrates that the power and strategic objectives are interconnected.

THE HUMAN LOSSES AND THE HOLOCAUST

The more territories were occupied by Germany in Europe, the more Jews and other groups of people from the Soviet Union, Poland and other areas were incorporated into the German Reich, the more power and resources did Nazi Germany accumulate. All this, contributed towards the attainment of political objectives[138]. If a state hopes to survive and prosper, it has to pursue such strategy that would enrich itself with the

[134] Nye, 2004: 1-2
[135] Gray, 2010: 161
[136] Lowe, 2005: 36
[137] Emmott, 2008: 50
[138] Sloan, 2017: 1

resources, which would lead to hegemonic power that is composed, as Brzezinski defines, of money, production capacity and military power. Through Germany's occupation of more territories in Europe strived to provide food and industrial supplies for German people, and living space in which the excess German population could settle and colonize[139].

As the Allied Powers proceeded into Germany and Poland, they discover evidence of atrocities. For instance, in Poland, in 1944 it was discovered that 1.5 million people were murdered at Majdanek – the majority were Jews, Soviet prisoners of war, Poles who opposed the German occupation – and, between December 1941 and May 1945 in Chelmno, 5.7 million Jews were murdered[140]. At least 20 camps were set up by the Germans to carry out the Holocaust[141]. However, in addition to Jews there were also non-Jews murdered – gypsies, socialists, communists, homosexuals, mentally ill, Soviet prisoners of war, freemasons, Jehovah's, witnesses, Romani, and disabled[142]. Many died because of disease, starvation, massacres, bombing, and deliberate genocide. There are estimates that 60 million people died in the war (20 million soldiers, 40 million civilians)[143]. It has also been approximated that the Soviet Union lost around 27 million people during the war, almost half of all the Second World War deaths; and approximately 85% of total deaths were on the Allied side[144]. However, many deaths went undiscovered, thus there are many statistics that present estimates of the death tolls of the war casualties in the Second World War.

It could be posited that Germany, especially Hitler's racial politics, categorized human beings by stereotyping them as mentally and behaviourally disordered that they operated as virus destroying the "public hygiene"[145]. Those human beings who were labelled as the 'non-hygienic' were treated as legal exceptions. Hitler's reasoning behind labelling certain humans categories as 'non-hygienic', i.e. legal exception against which the use of violent coercion – aggression – was permitted, was due to his vision that these human beings were 'not pure German

[139] Lowe, 2005: 74; Brody, 1999: 1
[140] Lowe, 2005: 111
[141] Lowe, 2005: 111
[142] Lowe, 2005: 111; Shaw, 2000: 36-37
[143] Shaw, 2000: 35
[144] Shaw, 2000: 35
[145] Foucault, 1978: 6

race', i.e. non-Aryans. According to Hitler, mankind could be divided into two groups, Aryans and non-Aryans. The Aryans were the Germans – tall, blond, blue-eyed and handsome; they were the master race, destined to rule the world[146]. All the rest – Slavs, coloured peoples, especially Jews – were inferior; excluded from the 'national community' along with others who were considered unfit to belong; the Slavs were destined to become the slave race of the Germans[147]. The number of the human losses in the Holocaust demonstrates the extent to which Hitler's Germany was willing to take its political framework of the Friend/Self and the Enemy/Other, in order to make Germany the master race as well as the global hegemony, which would posses the exceptional executive and judicial powers in the international affairs that would also contribute in setting up its own international order to which the rest of the international community would be bound to. In order to be able to carry out these heinous crimes against humanity Hitler used the Friend/Self and the Enemy/Other politics to shape his political agenda through the humanitarian and nation-building principles, which led to a public support that gave him the necessary legitimate power to act as the sovereign.

THE ESTABLISHMENT OF THE INTERNATIONAL MILITARY TRIBUNAL OF NUREMBERG

The evidence that the Allied Powers – the United Kingdom, the United States and the Soviet Union – had been presented with in the Moscow Declaration on aggressive politics conducted by Hitler's Germany – the atrocities, massacres and cold-blooded mass executions – led to the setting up of the International Military Tribunal of Nuremberg. The agreement for the establishment of the International Military Tribunal of Nuremberg was signed in London on 8th August 1945. The foundation of the International Military Tribunal of Nuremberg acted as a prosecutorial response to these international crimes that occurred at both the national and international levels. On 11th December 1946, the General Assembly resolution 95(1) was adopted, which

[146] Lowe, 2005: 309
[147] Lowe, 2005: 309

initiated the judgment procedure on the 1st October 1945[148]. The International Military Tribunal of Nuremberg sentenced twelve Nazi defendants to death and seven to periods of imprisonment raging from ten years to life.

Nonetheless, all the discussion on authorization of the prosecution of the crime of aggression perpetrators and the first attempt to establish the definition of the crime aggression began with the Soviet Union initiation just prior the Moscow Declaration 1943.

PRIOR TO 1943

The initiator of launching the inquiry on the responsibility of Nazi Germany's crimes – for unleashing horrendously global and cruel war with numerous human casualties, and breaching elementary principles of the international treaty law – was the government of the Soviet Union[149]. This inquiry demonstrates that the Soviet Union acts as a sovereign that determined the exception (the Enemy/Other) in relevance to the subject (the Friend/Self) who appears to be the victim of these crimes. This situation for Schmitt quoted by Agamben, sets up an essential proximity between the state and the sovereign where the sovereign proclaims the state of exception[150]. Due to the 'political crisis' – horrendously global and cruel war with numerous human casualties – the sovereign (the Self), the Soviet Union, pushed forward the concept of the exceptional measures on Nazi Germany (the Enemy/Other). This, simultaneously, created unequal treatment of nation-states, which led to the dichotomous conflict between great powers of that time – the Allied Power and the Axis Powers.

The enactment of exceptional legal measures by both alliance systems was due to the manifestation of the political crisis in intentional affairs. The political crisis embraced the notion of 'power struggle' between two power camps where each upheld its own 'way of life' vision. One could argue that, the political crisis manifested upon the clash of the 'way of life' generating the Friend/Self and the

[148] Cassese, 2017
[149] Naumov, et al., 2016: 338-339
[150] Agamben, 2016

Enemy/Other dichotomy. In the case of the Nuremberg Tribunal the heinous crimes committed by Nazi Germany pushed the international community into the political crisis by throwing it into 'hysteria'. The 'hysteria' led to the establishment of the alliance system, the Allied Powers, who positioned themselves as the upholders of the legal norm, which automatically labelled them as the 'sovereign exception'.

Acting as the 'sovereign exception' allowed the Allied Powers to relate the legal measures of the state of exception to suspend their own coercive and use of force[151]. This led to the legitimization of the use of force by the Allied Powers in order to counter and to contain the enemy, while the enemy's use of force becomes criminalized as crime of aggression. This created a disequilibrium as how things would be perceived. More particularly the Allied Powers arbitrarily positioned themselves as the legal norm, the Self, while condemning the other side as the aggressor, the Enemy/Other. This kind of political tactic created a dichotomy between the victims (the Friend/Self) and the oppressors/aggressor (the Enemy/Other). This is evidenced in the reports presented by the Soviet Union at the international conference in London 1941 and in other following recorded notes.

The very first warning statements presented by the Soviet Union took place at the international conference in London on 24th September 1941 and in the upcoming documents as well. These documents dispatched information that on 25th November 1941: "About the outrageous atrocities committed by German authorities in respect to the Soviet Union's prisoners of war"[152]; on 6th January 1941: "Widespread robberies, the devastation of the population and the monstrous atrocities committed by German authorities in the occupied Soviet territories"[153]; on 27th April 1942: "About the monstrous atrocities, atrocities and violence of the German Fascist invaders in the occupied Soviet territories and about the responsibility of the German government and the command for these crimes"[154]; and on 14th October 1942, the USSR issued a further statement: "The responsibility of Hitler's invaders and their accomplices for the atrocities committed by them in the occupied territories [of the USSR and] in

[151] Vinx, 2014
[152] Naumov, et al., 2016: 339; Mayorov, 1944: 184-190
[153] Naumov, et al., 2016: 339; Mayorov, 1944: 195-215
[154] Naumov, et al., 2016: 339; Mayorov, 1944: 228-269

Europe"[155]. Therefore, the Soviet Union demanded that the German leaders and their associates should and would be severely punished[156].

According to Schmitt, referred by Agamben, these statements objectify 'the Enemy/Other' – Nazi leaders and their associates – and push the object outside the law by categorizing it as a 'legal exception' where the only "pure evil and violence" exists[157]. Consequently, by objectifying the other side of the party to the conflict, the Enemy/Other, also leads to the criminalization of its actions, i.e. its use of force by labelling it as crime of aggression. The other party to the conflict, compared to the former one, is seen to promote morality in the international system, which upholds peace, order, and security; as codified in one of the UN's purpose and principles in the UN Charter Article 1(1). The one acting on behalf of morality, labelled as the legal norm or the Self, becomes authorized to use force against an enemy that is threatening the moral norms of the international system, i.e. 'the way of life'. By forging such concept, which applies to both the political and legal realms, allows the sovereign, the Self, to establish the 'emergency situation'. It could be argued that the law fluctuates. It tries to create 'spaces of operation' where one's actions, in this case the Allied Powers actions are defined within the legal framework, legal norm, while other – the Axis Powers – actions are outside the legal framework, legal exception. Hereby, the state of exception acts as the "space of enclosed systems" where two alliance forces or two different 'ways of life' collide against one another leading to a situation in which legal exception, the Enemy/Other, becomes part of the legal norm[158]. This tends to create a paradoxical relationship between the Friend/Self and the Enemy/Other where the latter is down played as shown in the following announcements posited by the Soviet Union.

The 14th October 1942 statement also expressed a desire that all interested states would engage in mutual cooperation in the search and extradition of guilty perpetrators, Nazi leaders and their associates, to the tribunal in order to hold them accountable for the committed crimes and enforce the execution of the punishment for organizing and/or committing a crime in the occupied territories[159]. However, the

[155] Naumov, et al., 2016: 339
[156] Naumov, et al., 2016: 339
[157] Agamben, 2016
[158] Deleuze, 1992: 1, 5
[159] Naumov, et al., 2016: 339; Mayorov, 1944: 314-319

main point of all these statements was to highlight the recognition of the immediate need to bring the Nazi leaders and their associates, who were in the process of creating a war, to justice in front of the international tribunal and punish them according to the strictest criteria of the criminal law[160]. This legitimate aspiration expressed in the statements, which was put forward by the USSR, was also shared with other states – Czechoslovakia, Poland, Yugoslavia, Norway, Greece, Belgium, Holland, Luxembourg and France[161].

The process of objectification of the enemy – the Nazi Germany and its associates – aims to criminalize this category and its actions by labelling them as a legal exception. For Schmitt, the legal exception is not codified in the existing legal order; rather it is characterized as extreme peril, a danger to the existence of the state[162]. This high awareness of the 'extreme peril and danger' is demonstrated in all the Soviet Union's statements, which started with the first warning document presented at the international conference in London on 24th September 1941 and followed by others on 25th November 1941, on 6th January 1941, on 27th April 1942 and on 14th October 1942 dispatching information on the danger and outrageous atrocities concerning prisoners of war and widespread robberies in occupied territories committed by the Nazi Germany[163].

According to, the French philosopher of thought systems, Foucault, this kind of criminal stereotyping of the Axis Powers by the Soviet Union at that time could be described as a mental and behavioural disorder that operates as virus destroying the "public hygiene"[164]. The 'virus' yields "social danger or insanity [in the international community's] living conditions"[165]. To control this danger or insanity, according to the sociologist, Giddens, a 'strong social body'[166] is required, which can be achieved though legal and political realms. These realms desire to control the danger hidden in human behaviour, as "the state of mental disorder is incompatible with the legal responsibility, thus immune for legal consequences"[167]. As a result, according to

[160] Naumov, et al., 2016: 340; Mayorov, 1944: 314-319
[161] Naumov, et al., 2016: 339
[162] Schmitt, 1985: 6
[163] Naumov et al., 2016: 339; Mayorov, 1944: 184-269
[164] Foucault, 1978: 6
[165] Foucault, 1978: 7
[166] Juergensmeyer, 2008: 388-389
[167] Foucault, 1978: 8

criminologist, jurist, philosopher and politician, Beccaria and philosopher, jurist and social reformer, Bentham, "penal justice must [be placed to] cure this illness of society"[168].

The horror of the crimes has to be reflected in the punishment, which the Soviet Union emphasized in their early warning statements between January 1941 and October 1942. Accordingly, the process of objectification of the enemy could be characterized as a tool that "steers the morality of the social sphere"[169] by announcing what constitutes to be civilized (the Friend/Self) and pathological stigma (the Enemy/Other) that consequently criminalizes, not only the individuals, but also the nations as the Enemy/Other[170]. As a result, the Nazi leaders and their associates became criminalized and categorized as legal exception, while the Soviet Union and the Allied powers remained within the realm of legal norm. Although, one could argue, that the Allied Powers acted arbitrarily on their own initiative by taking the power of criminalization, categorization and objectification into their own hands by becoming the sovereign who represent the legal norm in the international system and who decides on the exception. However, Schmitt posits the opposite. For him this act was not arbitrary, rather he grants the victorious allies the sovereign power in order to be able to exercise means of coercion and the use of force in order to uphold security, peace and order in the international system[171].

On the other hand, the process of criminalization of the object leads to a paradox between the legal right for violence and the law that aims to protect a given life form, i.e. 'way of life'. This statement can be applied to both sides of the conflict in the case of the Second World War – the Allied Powers and the Axis Powers. Both sides declare that their 'way of life' has been threatened, authorizing the state of emergency measures by legalizing the use of force, in order to counter the threat and to ensure one's security and survival. Prior to the 1943 Moscow Declaration, the Soviet Union (the Friend/Self) tried to protect the 'life form' by distancing itself from the crime perpetrators and at the same time to criminalize the perpetrators – Nazi Germany (the Enemy/Other) – and its illegal use of force and its horrendous atrocities taking place in the occupied territories.

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168 Foucault, 1978: 8
169 Lumby and Funnel, 2011: 281
170 Foucault, 1978: 10
171 Vinx, 2014

All these assembled proclamations, which took place prior to the 1943 Moscow Declaration, demonstrated the Soviet Union's awareness and construction of the threat of Nazi Germany. The idea of 'spreading danger' is reflected in Machiavelli's thought that the "world is a dangerous place"[172]. However, according to the Critical Terrorism Study author, Hurd, posits that the meanings and practices that form the social world are never static; they are constantly changing and evolving[173]. Thus, if a state hopes to survive and prosper in the international anarchical system, it has to enrich itself by accumulating power and wealth. In case of the Soviet Union, it tried to accumulate power against the enemy by forging a collaborative work through a system of alliances. For Thucydides, the formation of an alliance system is an obvious method for strengthening the odds of victory[174]. However, an alliance system is only possible to form up when the parties share a similar vision or 'way of life'. In other words, the documents, presented by the Soviet Union, point out the warning signs of the danger – heinous and torturous atrocities committed by the Nazi Germany in respect to prisoners of war, widespread robberies and occupation of European territories in order to supply necessary resources to provide food and industrial supplies for German people, and living space in which the excess German population could settle and colonize[175] – to the other Allied Powers in order to establish that there was an urgent need for collective action, in order to stop the 'menace' from spreading and engulfing the world into the terror. Otherwise, if the states would fail to act accordingly, they would risk being dismantled; their 'way of life' would be endangered.

[172] Jackson and Sorensen, 2010: 61
[173] Hurd, 2008: 300
[174] Jackson and Sorensen, 2010: 61
[175] Lowe, 2005: 74; Brody, 1999: 1; Naumov, et al., 2016: 339; Mayorov, 1944: 184-269

THE 1943 MOSCOW DECLARATION

After "receiv[ing] evidence of atrocities, massacres and cold-blooded mass executions"[176], and "people and territories suffer[ing] from the worst form of government by terror"[177] conducted by the Hitlerite forces in many countries, the Allied Powers decided to forge a joint alliance collaboration. However, the reasons for a joint collaboration of the Allied Powers can be viewed in two different ways: 1) Form an alliance system where the idea of territorial integrity and political independence drives people and states to experience collective and mutual security, and/or 2) As for Hobbes, the unification of forces is driven where the community shares mutual 'emotional distress'[178]. In this case, it could be argued that both reasons were present. The reasons arose more like in a 'domino effect'. As the forces of the Nazi Germany perpetrated violence in many countries in Europe, engulfing many territories under its tyrannical governance[179], they threatened many countries' existence – both territorial integrity and political independence – thus generating an 'emotional distress'. As a consequence, the Allied Powers endorsed the Moscow Declaration 1943 of joint collaboration, in order to neutralize their common enemy, the Nazi Germany, which threatened their 'way of life'.

On 1st November 1943, the Allied Powers – the US President, Franklin D. Roosevelt, British Prime Minister, Winston Churchill, and Soviet leader, Joseph Stalin – issued a joint declaration denouncing the war crimes perpetrated by the Nazis. Their determination was to punish the major war criminals, the German officers, and their associates, the members of the Nazi Party, "who have been responsible for or have taken a consenting part in atrocities, massacres and executions"[180]. This shows that the other Allied Powers – the United Kingdom and the United States of America – agreed with the Soviet Union on the concept of 'spreading danger that threatens our way of life' emitted from the Nazi Germany. As all the Allied Powers shared the common opinion they were willing to continue

[176] Roosevelt, Churchill, and Stalin, 1943: 2
[177] Roosevelt, Churchill, and Stalin, 1943: 2
[178] Jackson and Sorensen, 2010: 64
[179] Churchill, Roosevelt and Stalin, 1943: 834; Roosevelt, Churchill, and Stalin, 1943: 2
[180] Churchill, Roosevelt and Stalin, 1943: 834; Roosevelt, Churchill, and Stalin, 1943: 2

hostilities together against their common enemy, the Axis Power, in order to "ensure [a] rapid and orderly transition from war to peace and establishing and maintaining international peace and security with the least diversion of the world's human and economic resources for armaments" [181]. It could be posited that the Moscow Declaration operated as an initial stage where through the joint declaration the Allied Powers together pledged to point out the menace, the Nazi Germany, in the 'international social body'. Hereby, the Moscow Declaration constructed the very first conception, understanding and the formulation of unconstitutional offense of the crime of aggression.

This was outlined in the Moscow Declaration that gave the power to the Allied Powers to deploy politics of the 'state of exception' in the legal realm, in order to prosecute perpetrators of the crime of aggression: "The above declaration is without prejudice to the case of the major criminals, whose offences have no particular geographical localisation and who will be punished by the joint decision of the Governments of the Allies"[182]. I.e. to determine what constitutes a legal norm (the Self, which tries to preserve the life form) and what constitutes a legal exception (the Other/Enemy, which tries to destroy any life form). It could be posited that the attempt of including the definition of the crime of aggression in the Moscow Declaration made it possible the concept of the legal exception to be aggravated into the legal norm.

On the other hand, it made it more legally acceptable to wage war and hostilities against something that was legally labelled as 'abnormality'. Subsequently, the founding of the crime of aggression definition carried a 'double-edged sword' meaning as it was stated in the Moscow Declaration: "1) That their united action, pledged for the prosecution of the war against their respective enemy, will be continued for the organization and maintenance of peace and security, 2) That those of them at war with a common enemy will act together in all matters to the surrender and disarmament of that enemy, 3) That they will take all measures deemed by them to be necessary to provide against any violation of the terms imposed upon the enemy, 4) etc."[183].

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[181] Churchill, Roosevelt and Stalin, 1943: 821-822
[182] Churchill, Roosevelt and Stalin, 1943: 834; Roosevelt, Churchill, and Stalin, 1943: 2
[183] Churchill, Roosevelt and Stalin, 1943: 822

Luban describes this kind of labelling of 'abnormality' as:

> "Wars [that] are waged in the name of humanity [where humanity] has an especially intensive political meaning. When a state fights its political enemy in the name of humanity it seeks to embed a new universal concept against its military opponent"[184].

More specifically, any conflict that has been conducted aims to emphasize the difference between the Friend/Self and the Enemy/Other. There is a collision between two different 'ways of life' where one 'way of life' will prevail over the other. Nardin observes this process as "remaking regimes according to [victor's] own vision"[185]. Schmitt parallels this process of 'remaking regime' as "humanitarianism [being] extraordinarily dangerous"[186] where the participating parties in the conflict are inherently unequal. There are great power states and many smaller and lesser power states, which are easily overridden by the great powers' hard and soft powers. Leading to the notion where the "politics remain primary in the sense that it is up to political actors to decide when an actor in the international community becomes politically dangerous"[187]. It could be posited that the aim of pushing the codification of the crime of aggression in the Moscow Declaration, as Schmitt would argue, was to "recognize [enemy] as the enemy"[188]. This would embed the Friend/Self and the Enemy/Other politics into the legal context for the future reference in case a dispute would arise. At the same time, through this process the Allied Powers were able to root their sovereign position in the international affairs.

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184 Luban, 2011: 7
185 Nardin, 2005: 25
186 Luban, 2011: 7
187 Luban, 2011: 9
188 Luban, 2011: 9

THE LONDON AGREEMENT 1945 – THE CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL OF NUREMBERG

Pursuant to the Moscow Declaration 1943, the Governments of the United States, France, the United Kingdom and the Soviet Union signed the London Agreement on 8th August 1945, which acted in the interest of all the United Nations[189]. This Agreement provided that the International Military Tribunal to be established for the purpose of the prosecution and punishment of major war criminals of the European Axis whose offences had no particular geographical location; as stated in the Nuremberg Charter Article 1[190]. Establishing the Nuremberg Tribunal, it also introduced a new legal term, the crime of aggression, for the first time into the international criminal law context. Forging a new legal term, according to Foucault, tends to create a new "disciplinary society, i.e. spaces of enclosure"[191] where a new space has its own set of rules as well as different control mechanisms[192].

However, this creates a paradoxical relationship between society and the sovereign – simultaneously pursuing 'life and death'. Foucault explains this paradox yielding a goal and a function where the sovereign rules on death, rather than administering life[193]. Foucault's wording on "to rule on death than administer life"[194] is similar to Schmitt's notion on 'sovereign's decision will have a greater impact in ideologically torn society'[195]. Meaning that the state of exception is a 'disciplinary mode' that juxtaposes the two dichotomous opposites – the Friend/Self, the Allied Powers, and the Enemy/Other, the Axis Powers. This increases the 'power struggle' through violence and/or the aggression between the two dichotomous alliance systems as each alliance aims to pursue their hegemonic power in the international affairs, which would allow them to claim a legally unrestricted *ius ad bellum*[196].

At the same time, on the other hand, each party of the dichotomy aims to preserve the 'life form' of their own 'way of life' by pointing out the menace in the 'international social body', in order to ensure their survival in the international

189 United Nations, 1949: 3, 89
190 United Nations, 1949: 3, 89
191 Deleuze, 1992: 3
192 Deleuze, 1992: 4
193 Deleuze, 1992: 1
194 Deleuze, 1992: 1
195 Vinx, 2014
196 Vinx, 2014

anarchical system. This logic is reflected in Schmitt's explanation of the political tension between the Friend/Self and the Enemy/Other where the purpose for existence, independence, and freedom of the society and the nation-state is dependant on the juxtaposition of two opposites[197].

Subsequently, this frames freedoms through tool of control of confinement[198]. As the Self and the Enemy/Other are prescribed different 'control mechanisms', so are the freedoms depending on their legal status that the individual or the nation-state has in the international system; whether classified as the legal norm or legal exception. These 'control mechanisms' emanate from the political entity[199], i.e. the sovereign who decides on the exception[200]. In this case, the Allied Powers acted as the sovereign who decided on the scope of the control mechanisms for the Other/Enemy – the Axis Powers – by signing the London Agreement in order to create: 1) Responsibility for the Other for its actions that took place in the past and for the present, 2) Referring to the identity that is labelled as the exception in legal norm[201], and 3) Attempt of inclusion of the new legal term, the crime of aggression, into the international criminal legal context.

The scope of the 'control mechanisms' of the jurisdiction was laid down in the Article 6 of the Charter of the International Military Tribunal of Nuremberg, which was annexed and formed an integral part of the London Agreement[202]. This legal provision provided that the Tribunal should have power over persons who had been acting on behalf of the European Axis and its interests, whether as an individual or as members of an organization, should be tried and punished. The crimes the individual or the members of the organization committed should be held accountable for the following crimes listed in sub-paragraphs of Article 6[203]:

(a) *Crimes against peace*: Namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties,

[197] Schmitt, 1996: 35
[198] Deleuze, 1992: 2
[199] Schmitt, 1996; 46
[200] Schmitt, 1985: 5
[201] Pugliese, 2010: 223
[202] United Nations, 2003: 4
[203] United Nations, 2003: 4

agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) *War crimes*: Namely, violation of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder to ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) *Crimes against humanity*: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Three other further extensions and assurances of the Allied political power in the sphere of 'control mechanisms' encompassed: 1) "leaders, organizers, instigators and accomplices, participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes, are responsible for all acts performed by any persons in execution of such plan" and 2) "the official position of defendants, whether as heads of State or responsible officials in government department, shall not be considered as freeing them from responsibility or mitigating punishment (Article 7)", as well as 3) "the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires (Article 8)"[204].

The scope of criminal responsibility laid down in Articles 6-8 of the Charter of the Nuremberg Tribunal can be associated with the power of politics that functions as a 'control mechanism' that establishes an idea where one 'enjoys advantage and domination over others'. This notion of power can be interpreted in several ways. Hans Morgenthau, a neoclassical realist, poses a pessimistic view on human nature.

[204] United Nations, 2003: 5; International Military Tribunal of Nuremberg, 1947: 11-12

He links human nature to the 'will to power'. 'Will to power', according to Morgenthau, is most evident in politics and especially in international affairs where "politics is a struggle for power over men, and whatever its ultimate aim may be, power is its immediate goal and the modes of acquiring, maintaining, and demonstrating it determines the techniques of political actions"[205]. A similar view is also shared by Machiavelli and Hobbes, for whom the acquisition, possession, deployment, and use of power are a central concern of political activity. As a result, international politics is portrayed as 'power politics', as "arena of rivalry, conflict, and war between states in which the same basic problems of defending the national interests and ensuring the survival of the stare repeat themselves over and over again"[206].

Furthermore, the power argument posed by the realists can be taken a step further by linking it to the ethical concerns. Frost argues that the power concept is born within self-interest, which is determined by ideas that we consider to be entitled to[207]. According to Frost, ideas, which help to form self-interest, embed ethical standing within both the individual and the authoritative institutions[208]. However, each actor in the international community stands for and pursues different ideas – i.e. values such as freedom, equality, justice, human rights, democracy, and etc. –, or the same values but through different argumentation, and/or different means and methods. It could be argued that the ideas that carry ethical concerns are reduced to self-interest, which are reflected into the legal context by the sovereign. In the case of the Charter of the Nuremberg, the victorious Allied Power were grated with the licence to act as the prosecutors, judges and executioners of the Axis Powers allowing them to root their ideals and values into the international legal context that would shape the international affairs as well as endow them with the sovereign, hegemonic, powers.

At this point of history only crimes against peace, war crimes and crimes against humanity were inscribed into the international criminal law; no crime of aggression was included as such, which reflected the sovereign's ideals and its self-interest at the time. However, there is a paradox that includes both similarities in

[205] Morgenthau, 1965: 195
[206] Jackson and Sorensen, 2010: 59
[207] Frost, 2001: 2
[208] Frost, 2001: 3

using force, but differed, in its purpose use. In order to contain the threat emanating from Nazi Germany at that time the Allied Powers had to commit to the use of force, i.e. aggression, as well. Similar to the Axis Powers – who used force, i.e. aggression, aiming to expand their Germanic territory, accumulate resources and living space, as well as committing horrendous human killing atrocities, in order to ensure Germanic racial supremacy – the Allied Powers used force, i.e. aggression, to stop and to contain the spread of the danger that threatened the Allied Powers' 'way of life'. In order not to fall under the same category of accusation as the Axis Powers, the Allied Powers avoided the inclusion of the crime of aggression as such crime into the international criminal law. This, according to Schmitt, allowed the Allied Powers as the victorious alliance to exercise coercion and the use of force of methods of warfare, which would otherwise be considered to be illegitimate in the context of mutual legitimate belligerency, in order to defend their 'way of life' against an Enemy/Other threat. As a result, this created unfair treatment of the adversary party to the conflict.

This led to the situation where the state of exception produced a "zone of autonomy into the law"[209] where sovereign's power is anchored in the legal order. Thus, the sovereign becomes external to the normally valid legal norm. As a result, by excluding the crime of aggression, as defined by international criminal law, at that time from the Charter of the Nuremberg, allowed the Allied Powers to stand outside, and yet at the same time belong to the legal order. This allowed the Allied Powers to practice coercion and the use of methods of warfare and at the same time not being accused for it. This is unique nature of the state of exception where, Schmitt argues, order in the juristic sense does prevail even of it is an extraordinary in nature allowing the sovereign[210] – the Allied Powers – to uphold the statehood for the self-defence cause[211].

This allowed the sovereign, the Allied Powers, to distinguish themselves as the Self from the Enemy/Other in the situation where they can decide over the exception"[212]. This led to a split of the parties to the conflict, where the Self viewed itself as 'the good side' or the victim, and the Enemy/Other was seen as 'the bad side'

[209] Agamben, 2006
[210] Schmitt, 1985: 12
[211] Schmitt, 1985: 12
[212] Schmitt, 1996: 25-26; Schmitt, 1985: 5; Agamben, 2006

or the aggressor. This, according to Haenel, gave "states the power[, for the Allied Powers,] to make all goals of humanity its goals too"[213].

This led to the dichotomous split within the international society where it was easier for the sovereign, the Self, to point a finger at the Enemy/Other and make it responsible for all the events and casualties that took place. In this case, the Axis Powers had to carry the criminal responsibility for all the crimes that occurred during the Second World War – crimes against peace, crimes against humanity and war crimes. Weber argues that, the Charter of the Nuremberg accused the "Nazi conspirators" for carrying out their crimes as part of a great "Common Plan or Conspiracy"[214], which is usually linked to Hitler's *Mein Kempf* book that operates as a confirmation of the Axis Powers crime of aggression intentions.

It can be posited that the Nuremberg Tribunal issued judgment on behalf of the Allied Powers, which violated fundamental principle of justice – the fair trial principle by removing the basic right for equal protection (Universal Declaration of Human Right Article 10) – where the Allied Powers acted as prosecutors, judges and executioners of the German leaders and its associates. One could argue that the Nuremberg Trials organized not to dispense impartial justice, but rather for political purposes[215]. British alternative judge at the Nuremberg Tribunal, Sir Norman Birkett, annotated on the political justice, which was pursued in the Nuremberg Trials, in his private letter in April 1946 that "the trial is only in form a judicial process and its main importance is political"[216]. While the chief US prosecutor and a former US Attorney General, Robert Jackson, declared that these trials at the Nuremberg were "continuation of the war effort of the Allied nations" against Germany[217], which echoes Clausewitzian dictum on 'war is politics by other means'. Weber argues that these charges were specifically created for this occasion and were applied only to the defeated side, Germany, where it had no position to oppose whatever the Allied Powers demanded[218].

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[213] Schmitt, 1996: 24
[214] Weber, 2017
[215] Weber, 2017
[216] Weber, 2017
[217] Weber, 2017
[218] Weber, 2017

Taking Luban's idea of "lawfare [being] species of the politicization of law"[219], this led to the politicization of the legal affairs that took place when the Nuremberg Charter was codified. This becomes most apparent in the Article 2 and 3 that act as the backbone of the 'power politics' where "the Tribunal shall consist of four members, each with an alternate" (Article 2) and "Neither the Tribunal, its members not their alternates can be challenged by the Prosecution, or by the defendants or their counsel" (Article 3)[220]. Firstly, Article 2 secures the four members' – the US, UK, France and the USSR – positions as the sovereign, the Self, in the international system. Further securitization of their position occurs in Article 3 where the four members' sovereign power became anchored in the legal order. As a result, the four members became part of the legal order. Through Articles 2 and 3 they legalized themselves as legal body, at the same time as the members represent nation-states they were at the same time outside the legal system. Here they created their own immunity from being prosecuted for the same accusations as the Axis Powers. This was pointed out by chief US prosecutor and a former US Attorney General, Robert Jackson, when declaring that the Nuremberg Tribunal "is a continuation of the war effort of the Allied nations" against Germany. He added that the Tribunal "is not bound by the procedural and substantive refinements of our judicial or constitutional system"[221].

Following Schmitt's work, the state becomes fused with the notion of sovereignty that embraces politics within itself by producing the dichotomous notion of the Friend/Self and the Enemy/Other into the social sphere, in order to uphold the 'way of life' of own and projecting this fusion into the legal affairs[222]. Thus, the role of politics manages to penetrate the legal realm and, as a result, it engraved its agenda according to the one that defined itself as the Friend/Self. Even some of the Allied Powers privately acknowledged that the Nuremberg Trials were not organised in impartial justice, but rather for political purposes[223] as the British alternate judge at Nuremberg, Sir Norman Birkett, in April 1946 elaborated in a private letter that "the

[219] Luban, 2011: 2
[220] International Military Tribunal of Nuremberg, 1947: 8
[221] Weber, 2017
[222] Schmitt, 1996: 20-21
[223] Weber, 2017

trial is only in form a judicial process and its main importance is political"[224]. Hereby, the Charter of the Nuremberg – decree issued by the European Advisory Commission on 8th August 1945 – annexed to the London Agreement 1945, is a political tool that steers the international system into the favour the Allied Powers, in order for them to obtain their political objectives through legal means. Here the legal apparatus operated as a strategic tool deployed by the international actors, the Allied Powers, that, following Clausewitz's dictum, could be put as the continuation of power politics by other means.

However, the least discussed and less obvious matter in the politicization of the lawfare was the influence and involvement of international organizations such as the World Jewish Congress and the World Zionist Organization. This reaction stemmed from the heinous atrocities committed by the Nazi Germany, which focused on the extermination of Jews as described in Hitler's book, *Mein Kampf*. For Hitler Jews were seen as threat to the German nation, which he saw was at the verge of a historic racial and political struggle[225]. One of the indicative political natures and least renown of the Nuremberg process was the role of the Jews in organizing these trials. For instance, Nahum Goldmann, one-time president of both the World Jewish Congress and the World Zionist Organization, pointed out in his memoir that only after persistent efforts were the World Jewish Congress officials able to persuade the Allied leaders to accept the idea to prosecute Nazi leaders[226] and their associates, the groups or organizations – the Reich Cabinet, the Leadership Corps of the Nazi Party, the Schutztaffeln (known as the SS), the Sicherheitsdienst (known as the SD), the Geheime (known as the Gestapo), the Sturmabteilungen (known as the SA), the General Staff and High Command of the German Armed Forces[227]. As a result, an international organization, the World Jewish Congress, the "powerful and secretive [one] made sure that the Germany's extermination of the Jews was a primary focus of the trials, and that the defendants were punished for their involvement in that process"[228] as this posed a threat for the racial extinction through indiscriminate and disproportionate conduction of the crime of aggression.

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[224] Weber, 2017
[225] Lowe, 2005: 81, 113, 118
[226] Weber, 2017
[227] United Nations, 2003: 6
[228] Weber, 2017

The role that the World Jewish Congress and the World Zionist Organization played was crucial in defining the Friend/Self and the Enemy/Other relationship in the Second World War; the Friend/Self being the victim, and the Enemy/Other being the aggressor. Thus, political distinction allowed actions and motives to be reduced to the Self and the Other dichotomy, i.e. Friend-Enemy perception, where the degree of Self and the Enemy intensity differ depending on the union and separation of the dichotomy[229]. For Schmitt, this led to the development of the psychological sense of 'collectivity' that manifests in the political attitude of the State's domestic social affairs[230]. By forging a collective sense, e.g. the World Jewish grouping, has produced a dichotomous perception of the international system through a split, identification, and a sense of belonging to one or the other group. However, this identification or categorization to one group or the other is not always obvious and does not always depend on the individual's or state's will. In this case, the World Jewish community managed to influence the categorization that formed the sense of 'collectivity'. Simply put, the only party to the conflict that did not commit such atrocities towards Jews as the Nazi Germany was the alliance system of the Allied Powers. Based on this logic, it was obvious that the World Jewish organizations would promote their prosecution agenda with morality to the Allied Powers as they were solely seen accountable in the international system.

Despite the collective moral impact of the World Jewish organizations, which Judge Iola T. Nikitchenko shared in terms of 'ethnic cleansing' of Russians being conducted by the Nazi regime, who presided at the Tribunal's opening session, he also possessed strong opinion at the joint planning conference shortly before the Nuremberg Tribunal convened; Nikitchenko explained the Soviet view by stating[231]:

> "We are dealing here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and Crimea (Yalta) declarations by the heads of the Allied governments… The whole idea is to secure quick and just punishment for the crime…"

[229] Schmitt, 1996: 26
[230] Schmitt, 1996: 27-30
[231] Weber, 2017

> "The fact that the Nazi leaders are criminals has already been established. The task of the Tribunal is only to determine the measure of guilt of each particular person and mete out the necessary punishment – the sentences"

Nikitcheno's announcement intensified the distinction between the Other and the Self. It deepened the sense of union, i.e. collective sense, between the Allied Powers against the aggressor, the Enemy. It created a psychological and moral perception that manifested in the political attitude of the statecraft. This in turn set up a state of exception where the evil would find itself included in the law, but at the same time, according to Schmitt, outside the law where the "pure evil and violence"[232] manifested – "the fact the Nazi leaders are criminals has already been established"[233]. However, according to Schmitt, the state of exception is the culmination of the legal order after what order breaks down, unless the legal exception is returned back to legal norm sphere. By giving jurisdiction to the Nuremberg Tribunal through the London Agreement the state of exception was created, which distinguished clear a categorization between the Self, the Allied Powers, and the Other/Enemy, the Axis Powers. It gave clear slipt between those that were included within the legal norm sphere, the Allied Powers, and those that were excluded from it, the legal exception, the Axis Powers. Thus, the Allied Powers gained the sovereign power, in order to decide on the exception, the Other/Enemy – the Axis Powers. Correspondingly, this kind of alignment of facts leads to the assumption where the Charter of the Nuremberg, which was annexed to the London Agreement 1945, acts as a political agenda, in order for the Allied Powers to obtain their certain political objectives through legal means by positioning themselves as the sovereign, the Self, and the other party to the conflict as the responsible one, the Enemy/Other.

However, there were several difficulties concerning the identification and collection of proof for legal purposes. Even though the names of the chief German leaders and their associates were well known and the proof of their guilt would not offer difficulties, yet the crimes were committed on a large scale that led to the problem of identification, trial and punishment of their perpetrators[234]. It is almost impossible to establish the offender's identity or connect him/her with the particular

[232] Agamben 2006
[233] Weber, 2017
[234] Jackson, 1949: 5

charges, as the witnesses might already be dead, or otherwise incapacitated and scattered[235]. Thus, the London Agreement's outlined difficulties on war crimes, gathering proof would be laborious and costly as well as prove to be mechanically problematic, as it would involve uncovering and preparing proof of particular offences one of appalling dimensions[236]. Further complication of attempt to punish the Nazi leaders and their associates for their atrocities committed by them involved legal difficulties. Many atrocities, as noted in the 24 March 1944 statement, had begun during peacetime, and escalated during wartime[237]. These pre-war atrocities were neither war crime in technical sense or offences against international law[238]. However, the United Nations declared a policy where these crimes – war crimes, crime against humanity and crime against peace – would be punished as it was in the interest of post-war security, order and peace and necessary for rehabilitation of German people as well as the demand of justice[239].

UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 95(1)

On 20th November 1945, the Nuremberg Trial began and ended on 31st August 1946[240]. During this time the Tribunal held "403 open sessions, heard 33 witnesses for the prosecution against the individual defendants, and 61 witnesses, 19 of the defendants gave evidence for the defence. 143 witnesses gave evidence for the defence by means of written answers to interrogatories. Regarding the accused organizations, the Tribunal appointed commissioners to hear evidence. 101 witnesses were heard for the defence before these commissioners, while 1809 affidavits from other witnesses were submitted. 6 reports were also submitted, summarizing the contents of a great number of further affidavits. 38000 affidavits, signed by 155000 people, were submitted on behalf of the political leaders, 136213 on half of the SS,

[235] Jackson, 1949: 5
[236] Jackson, 1949: 5
[237] Jackson, 1949: 5
[238] Jackson, 1949: 5
[239] Jackson, 1949: 5-6
[240] United Nations, 2003: 6

10000 on behalf of the SA, 7000 on behalf of the SD, 3000 on behalf of the General Staff and OKW, and 2000 on behalf of the Gestapo. The Tribunal itself heard 22 witnesses for the organizations"[241].

Three weeks after the International Military Tribunal of Nuremberg rendered its judgment on 1st October 1946; the following individual defendants – Herman Goering, Rudolf Hess, Joachim von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Karl Doenits, Erich Raeder, Baldur von Schirach, Fritz Saukel, Alfred Jodl, Martin Bormann, Frantz von Papen Arthur Seyss-Inquart, Albert Speer, Costantin con Neurath, and Hans Fritzschen – were found guilty, while following groups – the Leadership Corps of the Nazi Party, the SS, the SD, and the Gestapo – were found guilty. However, the Tribunal declined to make that finding with the SA, the Reich Cabinet, and the General Staff and High Command[242]; the General Assembly convened the second part of its first session in New York[243].

Instead of setting up a temporary tribunal, the US initiated a request to reaffirm the principles set in the Nuremberg Charter. It can be posited that this was the first instance in history when the codification of the 'crime of aggression' was attempted. However, the crime of aggression as such was not included into the Charter of the Nuremberg. Instead the crime against humanity, crime against peace, and war crimes were prescribed there. As a result, on the 23rd October 1946, at the opening meeting the importance of the Charter of the Nuremberg was recognized[244]. The US President Truman addressed the General Assembly by referring to the Charter of the Nuremberg as: "The path along which agreement may be sought, with hope of success," among all countries "upon principle of law and justice" in order to better protect mankind from future wars[245]. This event aimed at transforming the Nuremberg principles from temporary nature into permanent one with the US' initiative. This meant that the notion of the sovereignty of the Allied Powers would also be translated into the permanent effect by identifying them, as the Friend/Self, and the ones from now on challenging or breaching these principles laid down in the Nuremberg Charter

[241] United Nations, 2003: 5-6
[242] United Nations, 2003: 7-8
[243] United Nations, 2003: 11; General Assembly Resolution 95(I), 1946: 1
[244] United Nations, 2003: 11; General Assembly Resolution 95(I), 1946: 1
[245] United Nations, 2003: 11; General Assembly Resolution 95(I), 1946: 1

would be labelled as the Enemy/Other. As the Allied Powers managed to solidify their sovereign seat in the international arena, at the same time they positioned themselves as an extra juridical body – belonging to the legal norm, but at the same time allocated outside of it. The Allied Powers created their own immunity protection against their own legal doctrine, which cannot be used against them, but only against those that questioned their power political sovereignty. Thus, the politicization of the 'crime of aggression', which took place during the London Agreement, became codified into an international legal system.

Furthermore, the US President Truman continued: "I remind you that 23 Members of the United Nations have bound themselves by the Charter of the Nuremberg Tribunal to the principle that planning, initiating or waging a war of aggression is a crime against humanity for which individuals as well as States shall be tried before the bar of international justice"[246], which clearly indicated inclination for categorization, i.e. a dichotomous split, of both individuals and states into the Friend/Self and the Enemy/Other categories. This is evident when he points out that the particular 23 members of the United Nations that have bound themselves to the Nuremberg Charter, which categorized them as the Friend/Self, i.e. the sovereign, as the victorious party to the conflict in the international system[247]. While the status of the rest of the international community, which was not part of the Nuremberg Charter, remained uncertain regarding their allegiance, either it lied with the Allied Powers or with the Axis Powers. As a result, a question arises as whether they should be considered as the Friend/Self or the Enemy/Other.

On 24th October 1946, in the US President Truman's Supplementary Report on the Work of the Organization (A/65/Add.1), delivered before the General Assembly, the Secretary-General of the United Nations advanced the proposition that the Nuremberg principles should be made a permanent part of international law: "In the interest of peace, and in order to protect mankind against future wars, it will be of decisive significance to have the principles which were implied in the Nuremberg trials, an according to which the German war criminals were sentenced, made a permanent part of the body of international aw as quickly as possible"[248]. As a result, according to the Secretary-General of the United Nations, the Nuremberg trials gave

[246] United Nations, 2003: 11
[247] Vinx, 2014
[248] General Assembly Resolution 95(I), 1946: 1; United Nations, 2003: 11

rise to new principles leading the progressive development of international law and its codification, as declared: "From now on the instigators of new wars must know that there exist both law and punishment for their crimes. Here we have a high inspiration to go forward and begin the task of working toward a revitalized system of international law"[249].

This statement resembles the purpose and principles outlined in the United Nations Charter Article 1. Correspondingly, it can be argued that there appears to be a tendency to assimilate the Nuremberg principles and the United Nations principles, i.e. to create interdependence between them. This became psychologically perceived as 'collectivity' where the Self, the Allied Powers – the US –, tries to expand its sphere of influence through other more internationally powerful institutions that also represent themselves as the Self and possess greater political and legal authority, which grants more legitimate status of the sovereignty. This makes it more legally acceptable to wage war and hostilities against something that was legally labelled as 'abnormality', which threatens the peace, order, and security of the international system.

This led where the sovereign, the Self, acts as the 'double-edged sword'. Firstly, their united action, pledged for the prosecution of the war against their respective enemy, will be continued for the organization and maintenance of peace and security; secondly, those of them at war with a common enemy will act together in all matters to the surrender and disarmament of that enemy; and thirdly, they will take all measures deemed by them to be necessary to provide against any violation of the terms imposed upon the enemy[250] as noted by the Secretary-General of the United Nations on pointing out that the Nuremberg principles should be made a permanent part of international law. According to Luban, this kind of labelling of 'abnormality' leads to where the "wars are waged in the name of humanity [where humanity] has an especially intensive political meaning. When a state fights its political enemy in the name of humanity it seeks to embed a new universal concept against its military opponent"[251]. This, according to Schmitt, makes war a strategy where it presupposes that the political decisions have already been made as 'who is the enemy', i.e. defined

[249] General Assembly Resolution 95(I), 1946: 1; United Nations, 2003: 11
[250] Roosevelt, Churchill, and Stalin, 1943: 822
[251] Luban, 2011: 7

identity of the enemy[252]. By linking the Nuremberg principles at that time to the 23 Members of the United Nations and to its purpose and principles that the United Nations upholds tends to create a strong sense of 'collectivity' of the Self, i.e. sovereign, in the international system. Anybody challenging or breaching the United Nations 'sense of collectivity' will be labelled as the Enemy. As a result, any instigator of new wars will be from now on be punished according to the existing law for their crimes, as the Secretary-General of the United Nations pointed out[253].

On 12th November 1946, the aims of 'sense of collectivity' of the Self was pursued by, the American member of the Nuremberg Tribunal, Judge Bibble's recommendation report to the President of the United States that "the United Nations as a whole reaffirms the principles of the Nuremberg Charter in the context of a general codification of offences against the peace and security of mankind"[254]. In response to this recommendation letter President Truman stated, "a code of international criminal law to deal with all who wage aggressive war… deserves to be studied and weighed by the best legal minds the world over" in support of the United States' delegation, he expressed the hope that the United Nations would carry out Judge Bibble's recommendations[255]. Further securitization of the Allied Powers as the Self was taken by the United States on 15th November 1946, where the United States delegation presented the proposal on 'Resolution relating to the codification of the principles of international law recognized by the Charter of the Nuremberg Tribunal' by referring to the Article 13(1)(a) of the Charter of the United Nations that warrants the progressive development of international law and its codification. Firstly, "this would reaffirm the principles of the international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal", and secondly, "the General Assembly should direct the Committee of the Progressive Development of International Law and its Codification to be treated as primary importance in the formulation of the principles of the Charter of the Nuremberg Tribunal and those found in the Tribunal's judgment in the context of a general codification of offences against the peace and security of mankind on in an international criminal code (A/C.6/69).

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252 Schmitt, 1996: 34
253 General Assembly Resolution 95(I), 1946: 1; United Nations, 2003: 11
254 General Assembly Resolution 95(I), 1946: 1; United Nations, 2003: 11
255 United Nations, 2003: 11-12

By referring to Article 13(1)(a) of the Charter of the United Nations and linking it to the principles of the Charter of the Nuremberg Tribunal and to the Tribunal's judgment of offences against the peace and security of mankind gave the Allied Powers, the United States, a possibility to pursue and to secure their/its 'sovereign stability' in the international system even after the Nuremberg Tribunal had been held. The logic behind this is to create a societal order. According to Schmitt, during war times both law and the constitution cease to exist and instead it creates both the state of emergency and state of exception in the social order[256]. As a result, the power to decide on the enemy and prescription on verdicts on life lies in the hands of political entity that has defined itself as the sovereign – in this case, the Allied Powers in the Second World War. As the Second World War came to an end, according to Schmitt, politics disappeared where human life depended on the political tension[257], which created the Friend/Self and the Enemy/Other dichotomy. According to Schmitt, if the disposition of the Friend/Self and the Enemy/Other disappears from the political life, then the 'way of life', which secrets morals, motives and justice, will disappear as well leading to depoliticization – neutralization – of the international community where there will no longer manifest conflicts between different parties through ideological, civilizational, or in power struggle manner[258].

As a result, on 11th December 1946, on the initiative of the US delegation, the General Assembly Resolution 95(1) was adopted unanimously that affirmed the principles of the international law by recognizing the Charter of the Nuremberg Tribunal and the Tribunal judgments, which was then directed to the Committee on the Progressive Development of International Law and its Codification to consider for the formulation of those principles[259]. This resolution made it sure that the Allied Powers position would be secured within the international system. More particularly, the Allied Powers became associated with the United Nations as the 'Self-institution' in the international system that "maintain[s] international peace, order, and security and takes effective collective measures for the prevention and removal of the threat to the peace, [order and security]" as defined in the Article 1 of the Charter of the United

[256] Schmitt, 1996: 47
[257] Schmitt, 1996: 35
[258] Schmitt, 1996: 22, 36
[259] Cassese, 2017: 1; General Assembly Resolution 95(I), 1946: 1

Nations[260]. Consequently, the political phenomenon retains its influence in the international legal sphere where anything that would challenge or breach the United Nations principles and its purpose would be labelled as the Other/Enemy.

Thus, the context of the Friend/Self and the Enemy/Other groupings remain to pertain in the international system. Where politically united people or community will fight for the existence, independence and freedom based on the decision emanating from the political entity. In this case, as the Nuremberg principles and the Tribunal judgments have been 'fused' with the United Nations threw the General Assembly Resolution 95(1) this creates a new identity of the Self in the international system. Instead of being politically united people within a state, the nation-state system would reform into politically united community that would fight for their "existence, independence, and freedom based on the decision emanating from the political entity"[261] that defines itself as the Friend/Self, the sovereign in the modern international system – the United Nations. The more collectivized the nation-states become, the more united the political entity becomes, consequently, the more powerful as well[262].

The international institution, the United Nations, became politicized as well through war/conflict, just to mention a few cases such as the Former Yugoslavia, Rwanda genocide, or the War on Terror cases. The 'meaning of existence' where one's human life and its 'ways of life' are threated – similar to the Allied Powers during the Second World War, motivates these 'a just war/conflicts'. The more the international community faced heinous crimes against humanity, the more idea of an international criminal justice system re-emerged after the Cold War[263]. As a result, it can be argued that the international institutions like the United Nations became to deploy politics of the 'humanitarian project' in tackling the crime against humanity[264].

Accordingly, distinction between the Friend/Self, the United Nations, and the Enemy/Other groupings will prevail within the international system. However, the distinctions between the groupings does not solely rely on morals, motives, justice or economics, unless they intensify the political realm, which would translate into the

[260] Charter of the United Nations Article 1
[261] Schmitt, 1996: 46
[262] Schmitt, 1996: 46
[263] ICC, 2017: 3
[264] ICRtoP, 2018

Friend/Self-Enemy/Other distinction, only then the conflict is politically driven as it defines what drives human motives. A will to abolish war is a political motive, because the enemy is viewed as a monster, a threat, which must be defeated and destroyed at any cost[265], in order to preserve humanity. Forging a conflict/war serves the political purpose, according to Schmitt; this would uphold the legitimacy of the statehood within the international community where plurality of different ideologies, civilizations, and power struggle collides.

[265] Schmitt, 1996: 36

CHAPTER 3: THE 2010 KAMPALA CONFERENCE, UGANDA

Since the creation of the United Nations in 1945, the UN has considered establishing a permanent international criminal court[266]. After years of negotiations, a Diplomatic Conference – the Rome Conference 1998 – was held from 15th June to 17th July 1998 in Rome, Italy where the adoption of the Rome Statute marked an establishment of the International Criminal Court (ICC)[267]. The adoption of the Rome Statute, according to Kofi Annan, signalled, "hope to future generations and a step forward in the march towards universal human rights and the rule of law"[268]. More than 160 governments participated in the conference from which 120 nations voted in favour of the adoption of the Rome Statute of the International Criminal Court[269]. Only seven nations voted against the treaty, including the United States, Israel, the Peoples Republic of China, Iraq, and Qatar, while twenty-one countries abstained[270]. At the end of the Conference the Statute was open for signature and ratification.

The establishment of the ICC marked a major progress in development of international humanitarian law[271]. It took a step in tackling the impunity. However, in order for the Court to be effective, a large number of states had to ratify the Rome Statute and to adhere to the entry into force regulations as set forth in the Statute Article 126: "Enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations"[272]. Despite the Rome Statute of the International Criminal Court treaty was held in 1998, which established the International Criminal Court, only after four years it entered into force on 1st July 2002[273].

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266 ICRC, 2017
267 ICRC, 2017; Coalition for the International Criminal Court, 2017
268 Boas, 2013: 2
269 ICRC, 2017; Coalition for the International Criminal Court, 2017
270 ICRC, 2017; Coalition for the International Criminal Court, 2017
271 ICRC, 2017
272 ICRC, 2017; Rome Statute of the International Criminal Court Article 126
273 Rome Statute of the International Criminal Court

Even though states may share a similar vision on countering international crimes, yet they are hesitant to subscribe to the international institutes such as the ICC. In this process they tend to 'give up' some part of their sovereign power to the international institute that will have the "right and obligation to exercise domestic jurisdiction with respect to act of crime committed by another state"[274]. Thus, the ICC's jurisdictional power to prosecute an individual for the international crimes of genocide, crimes against humanity, and war crimes, as laid down in the Charter of the International Military Tribunal of Nuremberg, extends to the domestic legal affairs. This makes the ICC a supranational organization that stands above state's sovereignty. Due to this effect states are hesitant to sign, to ratify, and, finally, to be bound by the international treaties and the obligations that it brings along, and in some cases, as in the ICC, prescribing own jurisdictional power over state's domestic legal affairs. For instance, in the case of the US, it previously signed the ICC, but later formally withdrew from its signature and indicated that it did not have an intention to ratify it. This is a new turn in both the international political and legal affairs where it is normally perceived that states are the ultimate actors in the international system; no other institute stands above them. On the other hand, international institutions/organization reflect state's will that allows these entities to meet their ends and needs by endowing them with characteristics that might be needed, e.g. organs and powers – that is prescribed in institute's/organization's jurisdiction –, in order to succeed in their operations[275].

As a result, the ICC, established in Hague, had jurisdiction over suspected perpetrators of genocide, crime against humanity, war crimes or aggression, including superiors or military commanders (Article 5)[276]; as condemned in the Article 1:

> "*The International Criminal Court ("the Court") is hereby established. It shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute*".[277]

[274] Scharf, 2012: 359
[275] Klabbers, 2002: 8
[276] ICRC, 2017; Rome Statute of the International Criminal Court Article 5
[277] Rome Statute of the International Criminal Court Article 1

Though the ICC was established for the purpose of punishing the most heinous crimes committed in the twentieth century, the most disputable facet in the Rome Statute appeared to be the crime of aggression. The Rome Statute 1998 enlisted the following crimes, which the jurisdiction of the Court would cover – the crime of genocide (Article 6), crimes against humanity (Article 7), war crimes (Article 8), and the crimes of aggression (Article 5)[278] – yet it did not include the definition of the crime of aggression into the legal document at that time despite of all the cruelties committed during the First World War (1914-1918), the Second World War (1939-1945), the former Yugoslavia 1991-2001 and in Rwanda 1994[279]. Only, after twelve years, in the 2010 Kampala Conference, in Uganda, would the member states of the ICC gather reach a consensus on the agreement on the definition of the crime of aggression and its procedural regime, which would allow the ICC to exercise its jurisdiction over the crime of aggression category as, according to Ferencz and Eisenhower, "the world can no longer rely on force but must turn to the rule of law or else it will end all civilization"[280].

This was due to the escalation of competing needs, ideologies, and aspirations in the international community that resulted in the international frictions and conflicts[281], which further advanced the 'abyss' of conflicts that manifest in the international affairs. These security dilemmas urged the development of preventing the most heinous crimes of international concern from reoccurring in the future again together with the motivation to put an end to impunity for the perpetrators of these crimes[282]. However, it is essential to note that the notion of the criminality of waging aggressive war is based on the 'legacy' of the Nuremberg Tribunal, thus making the crime of aggression exclusively focused on state behaviour[283]. The definition, which was established prior-2017 in the ICC, set forth that only "state leaders and state officials with enough authority to engage the state's forces into aggressive action can be considered for the crime of aggression"[284]. Thus, the ICC's jurisdiction allows the

[278] ICRC, 2017; Rome Statute of the International Criminal Court Article 5
[279] ICC, 2017: 3
[280] Ferencz, 2016: 555
[281] Boas, 2013: 1
[282] Boas, 2013: 1-2
[283] Boas, 2013: 2
[284] Boas, 2013: 2-3

state to escape the responsibility for committing the crime of aggression and keep on prosecuting the state leaders and/or state officials.

However, this state-centred approach has been challenged with the increased tensions in the international society and with the twentieth century conflicts. According to Kaldor, there has been a decline of 'old wars' – "war[s] involving states in which battle is the decisive encounter" –, while the new type of conflict, the 'new wars', have emerged blurring the distinction between war, organized war, and large-scale violations of human rights, and as such involve networks of both state and non-state actors where most violence is directed against civilians[285]. Nevertheless, the Article 8 *bis*:

> Paragraph (1): "*'For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations*"[286].
>
> Paragraph (2): "*For the purpose of the paragraph 1, 'act of aggression' means the use of force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations*"[287].

– as one could argue, both the definition (Article 8 *bis*(2)) and the threshold clause (Article 8 *bis*(1)) – considers the implication for state responsibility making the new jurisdiction of the ICC to resolve the issue of interaction between two international law systems – the law of state responsibility and international criminal law.

Despite the fact that once the crime of aggression was described as the 'supreme international crime', yet was conspicuously left out from the international criminal law jurisdictional regime, which derived from the Nuremberg Tribunal's 'legacy'. However, in the 2010 Kampala Conference the Review Conference on the Rome Statute of the International Criminal Court finally reached an agreement on a

[285] Boas, 2013: 3
[286] ICC-ASP/6/20/Add.1, 2010: 12
[287] ICC-ASP/6/20/Add.1, 2010: 12

definition of the crime of aggression. Under this definition no individual would be found guilty of aggression, compared to previous jurisdiction, unless the ICC has first found that a state has committed an act of aggression[288]. Rather than raising apprehension about the concept of aggression as a source of state liability, instead it puts a question forward regarding to what extent – the threshold clause – the ICC findings impact the responsibility of a state of aggression. In other words, how the newly defined international criminal law agenda in Article 8 *bis* reflects the Carl Schmitt's agenda of the Friend/Self and the Enemy/Other in the newly formulated the crime of aggression definition and its threshold clause.

ARTICLE 8 *BIS* – JURISDICTION OVER THE CRIME OF AGGRESSION

The majority of the delegations, such as France, the UK, China, Russia, the US, Iran, Israel, Cuba, Brazil, and Norway, posited in one way or another, that the amendments were not compatible with the United Nations Charter[289]. They argued that it gave the Security Council the monopoly to determine the existence of an act of aggression. As a result, they referred to it as "the primacy" and "prerogatives of the Security Council" in maintaining international peace and security[290]. These delegations viewed that under the United Nations Charter Article 39, the Security Council has exclusive competence to determine a state act of aggression[291]. Leading to the assumption where the ICC would not be able to proceed with a case in the absence of a Security Council's determinations on the crime of aggression, e.g. as China delegation expressed that the "articles failed to reflect the idea that, with respect to the issue of an act of aggression, it is necessary for the Security Council to make a determination of its existence first before the ICC could exercise jurisdiction over the crime of aggression"[292]. Thus, embedding the possibility of the process being politicized,

[288] Akande and Tzanakopoulos, 2015
[289] International Criminal Court, 2010: 120-127
[290] Schabas, 2010; International Criminal Court 2010: 122, 124-126
[291] International Criminal Court, 2010: 124
[292] International Criminal Court, 2010: 125

which can yield Schmitt's notion of the Friend/Self and the Enemy/Other when solving disputes in international affairs.

One of the concerns posed by the Iranian delegation viewed the amendments to be incompatible with the United Nations Charter Article 51, which ingrains the 'inherent self-defence' clause[293]. Article 51 sets a sovereign clause that preserves state's natural/inherent right of war-making: "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations*..."[294]. This allows the states to preserve their sovereign and legitimate political power in the international affairs; that no other actor – especially an international organization that are entities that reflect states' will, which is prescribed in the international institutions/organization's treaty – cannot stand above the ultimate political actor, the state[295]. According to Iranian delegation, a danger regarding the limits of the legal armed force remains in two cases within the Charter – legitimate individual self-defence where a State is the object of armed aggression, and when the Security Council under Chapter VII of the Charter authorizes the Member States of the United Nations to use armed force[296].

However, the original purpose of the new Article 8 *bis* was to strip the powerful states from their sovereign power from acting as the 'Friend/Self '-hegemon who preserved the morality in the international system. Thus, the powerful states would be unable to prescribe the anomie to the Enemy/Other, which dehumanizing them. The purpose of the new Article 8 *bis* is to transfer the jurist, prosecutor and executive powers, which the Allied Powers exercised during the Nuremberg Tribunal[297], to a third and neutral party that would act on behalf of the international community by observing the peace and security. According to the Iranian delegation opinion the Conference failed to criminalize the act of aggression and to authorize a third party Court to determine the acts related to the crime of aggression, which would have brought to completion the work begun by the Nuremberg Tribunal[298]. Iranian concerns were verified through Judge Dr. Hans-Peter Kaul's annotation where the "permanent members of the Security Council should understand that the amendments

[293] International Criminal Court, 2010: 125
[294] Kaul, 2011: 2; Charter of the United Nations Article 51
[295] Klabbers, 2002: 8
[296] International Criminal Court, 2010: 126
[297] Weber, 2017
[298] International Criminal Court, 2010: 126

agreed in Kampala are no infringement on the powers of the Security Council, but a further strengthening of it authority; and the Security Council will, in the future, have the power to refer aggressions as a crime to the ICC"[299].

One could argue, that the new Article 8 *bis* aimed to erase the exercise of power politics of the Friend/Self and the Enemy/Other in the international affairs by the powerful States by establishing a structural limitation through international institutions, e.g. the UN and the ICC, to govern the conduct of the crime of aggression. According to defensive realist, Kenneth Waltz, the structural factors have limited how much power the powerful states can gain and exercise in the international relations, which tends to ameliorate security competition[300], but at the same time intensifies the competition for power by undermining the international security, peace, and order of international community. The structural limitations occurred through transfer of the power politics from the states, which identified themselves as the Friend/Self in preserving the peace, security, and order in the international relations; to a new authority, the UN and the ICC, that would from the 1st January 2017 on act as the sovereign authority preserving the legal order. As expected, the delegations of France, the UK, and the US posed a concern that their unilateral power to prescribe anomie to an Enemy/Other, as they did during the Nuremberg Tribunal, would be removed. The US expressed a the critical point by supporting France and the UK delegations' view, that "the primacy of the Security Council under Article 39 of the United Nations Charter in determining the existence of an act of aggression and the Council's primary responsibility with regard to matters of international peace and security" and, thus, the US "believe[d] that the Review Conference has made a wise decision to delay implementation of the crime of aggression to permit examination of the practical implications of the two methods being proposed for the operationalization of this crime" [301]. Instead, this power to condemn and prosecute a state for crime of aggression is now according to new amendments in the Rome Statute placed on the Security Council, which can then refer the case to the ICC. However, as the international institutions are entities set up by the states, thus, using Schmitt's analogy, they are unstable to uphold sovereign authority and the legal order

[299] Kaul, 2011: 15
[300] Mearsheimer, 2007: 72
[301] International Criminal Court, 2010: 126

in the international anarchical system[302]. States are the ultimate political actors that possess the power to govern their survival in the international state system and do to the final decisions regarding the peace, order, and security in the international affairs.

As a result, according to Schmitt, the new Article 8 *bis* has led to the process of 'depoliticization' where the disappearance of tensions, which forms the dichotomous distinction of the Friend/Self and the Enemy/Other, has led to neutralization of values that construct morals, motives and justice[303]. As the state's individual values disappear, so do the tensions between different conflicting parties. The disappearance of values, which the states uphold, can be linked to the removal of power politics from the international affairs between powerful states, which have yielded the Friend/Self and the Enemy/Other conflict. Instead, the power of determining the existence of an act of aggression has been given to the Security Council[304], which has led to the neutralization of power politics as no longer would states unitarily or though alliance system forge supreme and imperative values in international relation over other states' values. This opinion was expressed by two delegations. Brazil stated that the "amendments adopted represent a comprehensive compromise deal that is acceptable to all State Parties, even though it does not reflect entirely any delegation's initial position on the matter"[305]. A similar view was also expressed by Russia noting that "any consensus, not all the elements of the consensus decision satisfy everyone"[306]. As a result, the Security Council, composed of permanent members and non-permanent members, has to cooperate together by upholding and maintaining analogous/equivalent values, which prevents 'the Friend/Self and the Enemy/Other' politics from being exercised. This has resulted an argument by the delegations from France, the UK, China, Russia and the US posited, that the amendments are incompatible with the United Nations Charter, as states are not able to impose their unitary values over others, thus not able to form the Friend/Self and the Enemy/Other politics, which according to Judge Dr. Kaul pushes forward state's interests in international relations.

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302 Vinx, 2014
303 Schmitt, 1996: 22, 36
304 Schabas, 2010; International Criminal Court, 2010: 122, 124-126
305 International Criminal Court, 2010: 122
306 International Criminal Court, 2010: 126

As the Security Council members have to cooperate in order to prosecute crime of aggression violators, this has resulted additional limitation to the ICC function to execute the crime of aggression sentencing. As a hypothesis, if the ICC cannot proceed with a case due to the absence of a Security Council's determinations, this leads to the conclusion where the ICC's powers to prosecute the violators of the crime of aggression is blocked due to the disagreement among the Security Council members[307]. This is especially evident in the Global War on Terror conflict, where the members of the Security Council differ in their support of different oppositional parties to the conflict – Russia backing the Assad-regime, while the West (the US, the UK, etc.) reinforce the Syrian opposition or the moderate opposition (the anti-Syrian/Assad government). If the ICC's function to prosecute the crime of aggression is blocked due to the differing positions to conflicts, it can be argued that it is due to the manifestation of the Friend/Self and the Enemy/Other politics in the existing disputes, which create incomprehension in reaching mutual agreement in upholding values that would sustain security, order and peace in international affairs. One could argue that, the politicization of the Friend/Self and the Enemy/Other indeed continues to persist in international relations. As a result, the UK delegation pointed out at the Conference that there is a need for "mutual reinforcing relationship between the Council and the Court"[308], in order to prevent grave crimes – crime of aggression – from manifesting in the international community, which would entail of 'depoliticization' of international relations and forge unilateral values that are upheld mutually by all the state in the international community.

ARTICLE 8 *BIS*(2) – FORMULATION OF THE CRIME OF AGGRESSION DEFINITION

Another concern regarding the new Article 8 *bis* was its definitional formulation in paragraph 2, which is in conformity with the United Nations General Assembly Resolution 3314 (XXIX) – "Aggression is the use of armed force by a State against

[307] International Criminal Court, 2010: 124
[308] International Criminal Court, 2010: 124

the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition"[309]. The majority of the delegations – France, the UK, the US, Cuba, Belgium, Norway, Japan, Brazil, etc. – reiterated an opinion that the achieved definition of the crime of aggression renders a generic formulation[310]. According to the UK, the US, France, Belgium, Norway, and Brazil the generic formulation – also referred as broad interpretation or definition – was an appropriate solution for adopting a definitional interpretation for the crime of aggression, as France declared that it "welcomes the spirit of consensus that prevailed during the proceedings which led to the adoption of the resolution amending article 8 of the Rome Statute"[311]. According to Hoffman, broad interpretation engages with the interpretation of the meaning of the contract as a whole, which includes filling gaps in an incomplete text and extending the concept to apply to policies dealing with the restriction or disposition of new development, which may lead to an ambiguous outcome[312]. Using Luban's analogy of politicization[313], a broad definition tends to create a 'loop hole' making its scope to exclude acts that fall outside the insufficient gravity. However, the gaps created by the definitional formulation can also include acts that fall within the sufficient gravity depending on the politicization of the case and the stakes that are at place. Thus, both processes of exclusion and inclusion allow process of the Friend/Self and the Enemy/Other politicization to manifest through these 'loop holes', which become unconstrained due to the possibility for open interpretation in order to fill in the gaps within the legal definition[314].

This issue was addressed by the Cuban delegation. It expressed a viewpoint on the scope of the crime of aggression that the broader interpretation will exclude such cases that are insufficient in gravity and falling within the grey area[315] that it is "not limited solely to the use of armed force by a State, leaving aside other forms of aggression that may also violate the sovereignty, territorial integrity [and/]or political

309 United Nations General Assembly Res. 3314 (XXIX), 1974: 143
310 International Criminal Court, 2010: 120-127
311 International Criminal Court, 2010: 120, 122-124, 126-127
312 Barak, 2005: 6
313 Luban, 2011
314 Luban, 2011
315 ICC-ASP/6/20/Add.1, 2010: 4

independence of another States" (United Nations Charter Article 2(4))[316]. As a result, there is a danger that the newly adopted juristic order under the Article 8 *bis*(2) will not stop the manifestation of the Friend/Self and the Enemy/Other politics, but instead allows it to flourish by creating a new situation of exception. One could argue, that the adopted broad definition of the crime of aggression reflects a political agenda of the minority of the powerful delegations at the Kampala Conference, as the Iranian delegation posted that the "whole raft of proposals which were not very transparent, generally one-sided and showed little regard for the concerns of the majority"[317]. Consequently, this manifests violence between different parties to the conflict, as each party believes that it is in their interest. Consequently, the 'gaps' within the broad definition will allow dismissing facts that continue the revelation of the Friend/Self and the Enemy/Other politics.

Consequently, other delegations expressed one way or another their disappointment with the adopted definitional formulation of the crime of aggression, as in their opinion – Iran, Israel, Russia, China, Japan, Cuba, etc. – stronger and narrower interpretation of the crime of aggression would make more justice in relation to the criminal responsibility[318]. At the same time it would also restrain the Friend/Self and the Enemy/Other politics in the international affairs, which tends to steer conflicts in the 21st century, such as the Global War on Terror, which was precipitated by the occurrence of the 9/11-incident. While the Iranian delegation insisted on the formulation of the crime of aggression as an "act by necessity serious" recalling the two exceptions in UNC Art2(4) rather than "the most serious and dangerous for of illegal use of force" by linking it to the United Nations Charter[319]. Both Iranian and Libyan delegations viewed that the crime of aggression should be criminalized and that Article 8 *bis*(2) needed further specification of restrictions and conditions of the state act of aggression as: "such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing the territory of another state or part thereof" as well as inclusion of

316 International Criminal Court, 2010: 124; Charter of the United Nations Article 2(4)
317 International Criminal Court, 2010: 125
318 Schabas, 2010
319 Schabas, 2010

confiscation of property and the establishment of settlements in occupied territories[320].

By having a stronger and narrower definitional formulation would provide firmer structural amendment to the Rome Statute, as narrow definition would define the exact processes for which the criminal responsibility will be subjected. According to Kenneth Waltz, it would limit power politics of the Friend/Self and the Enemy/Other conducted by the powerful states, which appears to be the minority as well. One could argue, that the 'vicious cycle' has prevailed in the newly adopted crime of aggression definition since the Nuremberg Tribunal when the Allied Powers seized the "prosecutor, judge and executioner"[321] power allowing the powerful states to apply their political agenda in conflicts in order to achieve their political goals, i.e. interests. This is evident in the broad definition adopted in the Article 8 *bis*(2) allowing gaps of the textual interpretation to prevail, thus enabling process of the Friend/Self and the Enemy/Other politicization of the legal doctrines to take place. This has led to what offensive realists, John Mearsheimer, argues of maintaining legal system structure that encourages states to maximize their share of world power through legal means[322]. This intensifies the security competition between the states where contrasting values collide generating a conflict that bears dichotomous nature by juxtaposing two different polarities.

At the same time a political agenda becomes manipulated as these different polarities stress opposing cultural and identity differences that persist within these nation-states[323]. In the Kampala Conference, it seemed that the powerful minority apprehended the majority by penetrating the legal agenda with the political underlying causes. For instance, an interest in continuation of waging global conflict in persuasion of state's objectives. This is evident in the case of the Global War on Terror as certain states – mainly the US who declared the Global War on Terror after the 9/11 attack by accusing Iraq of possessing weapons of mass destruction, which eventually turned out to be a false call – are bound with interest in search of natural resources – oil – in order to reinforce ones hegemonic power hold and economic

[320] ICC-ASP/6/20/Add.1, 2010: 5; Cohn, 2001: 2
[321] Weber, 2017
[322] Mearsheimer, 2007: 72; Vinx, 2014
[323] Huntington, 1993: 23

performance[324]. Furthermore, by enshrining power politics into the legal text will define the sovereign in the international affairs as he who is eligible to use coercive methods of the use of force to maintain peace, order, and security (UN Charter Article 1) in the name of humanity[325]. The disagreement on how the power politics should be divided in the international system was evident as how the powerful minority apprehended the majority in how the crime of aggression definition should be formulated and adopted.

As the new definitional formulation of the crime of aggression leaves a gap for the Friend/Self and the Enemy/Other politicization, thus Russia has expressed its disappointment with the consensus as it did not reflect the "full extent the existing system of maintenance of peace and security healed by the Security Council and first of all in the sphere of the Security Council prerogatives in defining the existence of an act of aggression"[326]. Instead, as Israel noted, it yielded "ambiguity and lack of sufficient legal clarity surrounding the interpretation of certain terms"[327]. This tends to question the role of power politics intertwined within the legal grounds of newly formulated term of the crime of aggression. This tends to indicate that the legal doctrine is "one-sided and [that it] showed little regard for the concerns of the majority" as the Iranian delegation pointed out at the Conference[328]. This seeming to suggest that not only was the end result of Artcile 8 *bis* adaptation politicized, but the entire Conference procedure was where delegations grouped – i.e. formed an alliance – according to their interests and values that each groups of states upheld. This resembled the Versailles Conference 1919 where nation-states were grouped in alliance systems – the Allied Powers and the Axis Powers. However, in the Kampala Conference the nation-states were divided into the 'Western side' (US, UK, France, Norway, etc.) and the 'Eastern side' (Russia, Iran, China, Israel, etc.).

It can be argued that this divisional politicization of the Article 8 *bis*(2) is due to the disagreement on values and interests that the states share. The Article 8 *bis* was adopted in the 21st century where the most values and interests are shaped by the contemporary dispute – the Global War on Terror, which can also be referred as a

[324] Asthana, et al., 2016
[325] Luban, 2011: 7
[326] International Criminal Court, 2010: 126
[327] International Criminal Court, 2010: 126
[328] International Criminal Court, 2010: 125

regional 'proxy war' carried out by powerful states. It can be noted that this conflict has had its impact on formulating the Article 8 *bis*(2) definition. The Article can be found to be very broad in its interpretation leaving out acts of insufficient gravity from being prosecuted. However, narrowing it down to specific use of force acts would condemn the manifestation of crime of aggression and violation of sovereignty, independence, and territorial integrity (United Nations Charter Article 2(4)) as mentioned by the Iranian delegations[329]. Instead, the Article 8 *bis*(2) mentions "means the use of force by a State" in generic terms. Though this formulation is followed by a list of acts in sub-paragraphs (a)-(g) that are qualified according to the United Nations General Assembly Resolution 3314 (XXIX) as acts of aggression. However, these deeds are linked to a state actions, not individual conduct as pointed out in the Article 8 *bis*(1), which also sets the threshold clause. It is possible to state that these two paragraphs (1) and (2) of Article 8 *bis* tend to cancel each other, preventing justice to be served.

ARTICLE 8 *BIS*(1) – THRESHOLD CLAUSE

In the Kampala Conference, delegations from the member states of the ICC were gathered to negotiate on the formulation of the crime of aggression. The definition of the crime of aggression was reached at the Conference by including it in the Article 8 *bis*(2):

> "*For the purpose of the paragraph 1, 'act of aggression' means the use of force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations*"[330].

However, the Article 8 *bis*(2) should be read in conjunction with the threshold clause, which was worded in the Article 8 *bis*(1):

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[329] International Criminal Court, 2010: 125-126
[330] ICC-ASP/6/20/Add.1, 2010: 12

"*'For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations*"[331].

The paragraphs (1) and (2) of the Article 8 *bis* cannot be read separately; they have to be read together as they fully contextualise the adopted crime of aggression definition. Due to the broad definitional formulation in the Article 8 *bis*(2) the threshold clause in the Article 8 *bis*(1) also becomes broad in its interpretation as noted by the Israeli delegation: "Among other things, we remain concerned of the ambiguity and lack of sufficient legal capacity surrounding the interpretation of certain terms"[332]. Leading to an issue of ambiguity in the application of the threshold clause as Cuban delegation expressed that the scope of the crime of aggression in paragraph (2) holds a broad interpretation that will thus exclude such acts that are insufficient in gravity and those that fall within the grey area[333]. This further politicizes the newly adopted Article 8 *bis* allowing the Friend/Self and the Enemy/Other to manifest within the crime of aggression in grey areas as the proportionality criteria of character, gravity and scale was unclearly set in relation to the state act of crime of aggression in paragraph (2). The ambiguity in the legal doctrine, i.e. the grey area, surrounding the threshold clause allows the political agenda of powerful states to manoeuvre disputes in the name of humanity, at the same time conceal a factor behind contemporary conflicts – an interest[334]. One could argue, that the legal doctrine of threshold clause creates 'deception' allowing states driven with interests to obtain their political objective, e.g. in the case of Iraqi invasion for search of weapons of mass destruction, which did not after all exist there, instead the Iraqi invasion coalition bared in mind the oil resources allocated in the region.

However, a problem persists within these newly adopted paragraphs (1) and (2) in Article 8 *bis*. As much as they have to be read in conjunction, as noted in

331 ICC-ASP/6/20/Add.1, 2010: 12
332 International Criminal Court, 2010: 126
333 ICC-ASP/6/20/Add.1, 2010: 4
334 Kaul, 2011: 2; Luban, 2011: 7

paragraph (2) – "For the purpose of paragraph 1", at the same time they cannot be. This is due to the fact that the paragraph (1) taken together with draft Article 25 *bis*(3). The draft Article 25 *bis*(3) ensures the leadership requirement would not only be applied to the principal penetrator, but to all forms of participation by an individual responsible for the crime of aggression[335]. As a result, Article 8 *bis*(1) reflects the progress made thus far on the definition of the individual's conduct of the crime of aggression[336] – "crime of aggression means …, by a person in a position effectively to exercise control". While paragraph (2) of Article 8 *bis* links act of aggression to a State – "act of aggression means the use of armed force by a State"[337]. In other words, paragraph (1) of Article 8 *bis* reflects individual responsibility, while paragraph (2) prescribes the state responsibility. This leads to a hypothesis that these paragraphs are not compatible with their responsibility purposes, thus the Friend/Self and Enemy/Other politicization continues within these responsibility clauses. Arguably this can be linked to what Schmitt notes that the political concept of the Friend/Self and the Enemy/Other can only focus on one specific conflict/responsibility at a time, thus being bound to a concrete situation/clause[338]. This connects the specific type of conflict scenario with the specific type of responsibility.

As a result, this has led to further complications of the threshold clause. As threshold clause is only outlined in the paragraph (1) of Article 8 *bis*, thus the threshold clause becomes linked to an individual responsibility and not to state responsibility. Though paragraph (2) refers to paragraph (1), yet they act independently. As a threshold clause is tied up to a specific type of responsibility, it can be argued, that the threshold clause becomes unevenly applied. Due to asymmetrical application of threshold cause it becomes easily intertwined with the Friend/Self and the Enemy/Other politics. This creates a scenario where violence is unequally distributed by creating two different scenes of the state of exception. The first state of exception in relation to the individual responsibility and the threshold, which is dependent on "person['s] effective exercise [of] control over or to direct the political or military action of a State… its character, gravity and scale…", and the second where the state of exception is linked to the state responsibility and the acts

335 ICC-ASP/6/20/Add.1, 2010: 3
336 ICC-ASP/6/20/Add.1, 2010: 10
337 ICC-ASP/6/20/Add.1, 2010: 12
338 Schmitt, 1996: 30

that are enlisted in sub-paragraphs (a)-(g), which are in accordance with the United Nations General Assembly Resolution 3314 (XXIX).

As two different jurisdictional the state of exception orders are set, which are governed with two different legal orders, thus two different political categories are establish as well. These groups, according to Schmitt, came to be based on a particular identity that serves as the substance of the Friend/Self and the Enemy/Other distinction. Such an identity must differ from the identity of any other political community for the group in question to achieve a political identity of its own[339]. In this case, the two different identity categories are the individual responsibility outlined in paragraph (1) and the state responsibility in paragraph (2). This will also entail that one takes the view that a war is legitimate on one side, while illegitimate for the other; creating an anomie[340]. Two scenarios of the state of exception are produced where an individual can be labelled as a legal exception and thus be prosecuted under the Article 8 *bis(*1), or the state of exception where the state becomes categorized as the legal exception under the Article 8 *bis*(2).

Even though the paragraph (2) definition of the act of aggression is linked to a state conduct, but it does not contain a threshold clause as such. Paragraph (2) does enlist acts of aggression in its sub-paragraphs (a)-(g), which could be associated to set up a threshold for the state responsibility, but the threshold as such is not directly outlined in the paragraph (2), compared to paragraph (1) – "character, gravity and scale"[341]. The state act of crime of aggression, becomes open-ended as the threshold clause is missing, and instead it becomes hard to evaluate the level of 'character, gravity and scale' of these deeds. This is due to the threshold clause being left out from paragraph (2), and instead linked to the individual conduct. A state remains in the sphere of legal norm, while the individual can be removed from the legal norm into legal exception category, thus the state remains unquestionably the force that upholds the survival of the nation-state and legitimate power to secure its position in the global arena against the Enemy/Other that threatens its 'way of life'.

Even though these paragraphs can be read in conjunction, as the paragraph (2) refers to paragraph (1) – "For the purpose of paragraph 1"[342], i.e. supporting it. Yet,

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339 Vinx, 2014
340 Vinx, 2014
341 ICC-ASP/6/20/Add.1, 2010: 12
342 ICC-ASP/6/20/Add.1, 2010: 12

the support is accentuated at the individual responsibility. One could argue, that if the purpose of the Kampala Conference was to criminalize state's act of crime of aggression, it would probably be outlined in the paragraph (1). Hereby, these paragraphs would be in reverse order. Causing any person in change who acts on behalf of a state to be linked to a state, and consequently, a state becomes responsible for the crime of aggression as the leaders represent the state. Instead, the current adopted formulation still ends up putting all the responsibility on individual who is exercising control (Article 8 *bis*(1))[343]. A state responsibility without a threshold clause leaves the state within the legal norm, while the individual who operates "behind the curtains" on behalf of the state is prosecuted for the crime of aggression[344].

As a result, this has led to a development of new circumstances where the new 'police system' through Article 8 *bis* amendments aims to gain a new approach to the Friend/Self and the Enemy/Other power politics[345]. It can be argued that the 'police system' attempts to be achieved through a new legitimate international order, which is imposed 'by force' by the minority at the Kampala Conference, while the majority expressed its disappointment with the adopted Article 8 *bis* formulation, as the formulation of the Article 8 *bis* remains open-ended in its definition and in its threshold clause as well. As argued by Schmitt, in order to uphold plural international order, there is a need for transference of *jus belli* into alliance system[346]. In this case it will redirect the dichotomous sense of the Friend/Self and the Enemy/Other from forming independent coalitions of individual states into communal political community – alliance system – where the use of force will be exercised by the 'alliance' system – the Security Council. In which case a new state of exception of the Friend/Self and the Enemy/Other politics is established, which was legitimized through amendment formulation. Therefore, the majority of the delegations were disappointed with the amendment results to the Rome Statute in the 2010 Kampala Conference as it did adopt a state act of crime of aggression definition, but as it remained generic so did the threshold clause appear open-ended as well as its

[343] ICC-ASP/6/20/Add.1, 2010: 12
[344] Awareness, 2010
[345] Franck, 1991: 64
[346] Schmitt, 1996: 57

responsibility was diverted at the individual level, rather than condemning state actors that are the main legitimate political agents at the international affairs.

CONCLUSION

According to an observer of the criminalization of aggression, Judge Dr. Kaul, today world's reality seems quite obvious that certain states – especially the powerful ones – continue to reserve the natural/inherent right to make war/conflict, openly and/or discreetly[347]. He suggests that there is an interest behind waging war/conflict that is politically driven[348]. Similar view was shared by two famous lawyers. A British alternative judge at the Nuremberg Tribunal, Sir Norman Birkett, saw the political justice being pursued in the Nuremberg Trials (20th November 1945 – 31st August 1946) where "the trial [was] only in form a judicial process[, which] main importance [was] political"[349]. Further reaffirmation of this point was presented by the chief US prosecutor and a former US Attorney General, Robert Jackson. He noted that the Nuremberg trials were indeed a "continuation of the war effort of the Allied nations" against Germany[350]. These judicial observations pursued for political purposes echo Clausewitzian dictum on 'war[/conflict] is politics by other means'. Subsequently, Clausewitzian dictum could be revered to argue that 'law operates as war tool seeking political ends' both the International Military Tribunal of Nuremberg and the 2010 Kampala Conference. Hereby, suggesting that political agenda is intertwined with legal framework.

The outcome of the International Military Tribunal of Nuremberg was the creation of an unequal perception of the international actors in the international system. This was possible to achieve only by "recogniz[ing enemy] as the enemy"[351], which promoted the Friend/Self and the Enemy/Other political framework into the international criminal legal system. As a result, the Allied Powers were recognized as the Friend/Self. They served justice by advancing morality, and at the same time upholding security, peace, and order principles in the name of humanity in the global

[347] Kaul, 2011: 2
[348] Kaul, 2011: 2
[349] Weber, 2017
[350] Weber, 2017
[351] Luban, 2011: 9

affairs[352]. On the contrary, the Enemy/Other was perceived as evil, i.e. immoral, who spread death, violence, and brutality resulting in the 'collective trauma' and 'collective anxiety'[353]. The victorious Allied Powers seized the sovereign power by establishing the Nuremberg Tribunal on 20th November 1945. It gave them the ability to decide on the exception, and thus being entitled to apply means of coercion and use of force in order to uphold the international principles of the peace, order, and security in the name of the humanity[354]. This advanced the sense of morality within the international system through the Charter and judgment of the Nuremberg Tribunal, based on which the prosecution of the Nazi leaders and their associates was held. At this point of history, the sovereignty of the Allied Powers was fortified positioning them as unilateral and an extra juridical body giving them immunity against to be prosecuted their own legal doctrine. This entailed that they belonged to the legal norm, which was at that point of history the right choice to promote peace, order, and security in the international system that enabled them to be classified as the Friend/Self.

The newly adopted amendment(s) – Article 8 *bis* – in the 2010 Kampala Conference translated the natural/inherent sovereign power of the powerful states to the Security Council where the member states would need to collaborate to forge unilateral decisions. Majority of the delegations viewed this to be incompatible with the United Nations Charter – self-defence clause and Chapter IV. Firstly, it translated the natural/inherent sovereign power of the powerful states to determine on the existence of the crime of aggression to the member states of the Security Council, in order to preserve peace, order, and security (UN Charter Article 1)[355]. Secondly, it gave the Security Council the sovereign power to determine the existence of the crime of aggression before the ICC could exercise its jurisdiction over the crime of aggression. This would result in continuation of committing the crime of aggression by the powerful states in the international system, while consensus on the culprit would be pending. Consequently, the culprit would never end up being prosecuted by the ICC, as the Security Council could not reach the consensus on the matter. This is due to that fact that each state pursues their own political agenda that differs from

[352] Vinx, 2014
[353] Edkins, 2003: 2-3
[354] Vinx, 2014; Luban, 2011: 7
[355] International Criminal Court, 2010: 120-127; Kaul, 2011: 2

other states. As a result, this amendment transferred the *jus belli* into alliance system by taking away the natural/inherent sovereign power of singular states[356]. Thus, the Friend/Self and the Enemy/Other politics become associated with the Security Council as the one that decides on the exception, and the one who structures the legal order of the international system.

A generic formulation was adopted in amended Article 8 *bis*(2) definition. It excluded cases that were insufficient in gravity and that fell within the grey area. Consequently, majority of the delegations feared that newly adopted juristic order under Article 8 *bis*(2) would not stop the manifestation of the Friend/Self and the Enemy/Other politics within the legal framework, and instead would nurture a new situation of exception in the 21st century[357]. This concern was outlined by the Iranian delegation posing that the "whole raft of proposals which were not very transparent, generally one-sided[;] showed little regard for the concerns of the majority"[358]. Leading to unequal and discriminatory treatment of states within the international system where the sovereign Friend/Self decides on the exception, in this case the minority of the powerful states. As a result, the generic definition of the crime of aggression in Article 8 *bis*(2) reflects a political agenda of the powerful minority delegations at the Kampala Conference, as it allows to dismiss the facts that are relevant for the continue of the Friend/Self and the Enemy/Other politics.

Furthermore, the threshold clause of the crime of aggression is indicated in the Article 8 *bis*(1). It is linked to an individual responsibility, rather than to the state responsibility that is outline in paragraph (2). This boomeranged the full purpose of the 2010 Kampala Conference. Its aim was to criminalise the state act of crime of aggression; instead it diverted back to the individual responsibility from paragraph (2) to paragraph (1), as it used to be criminalised in the International Military Tribunal of Nuremberg. Although paragraph (2) enlists deeds that are regarded as state crime of aggression, but the paragraph itself does not contain a threshold clause. Instead, the broad formulation of paragraph (2) has to be read as the threshold clause as well, which leaves grey areas for interpretation of facts that are insufficient in their gravity. Thus, a state responsibility without a proper threshold clause leaves the state within the legal norm, while the individual who operates on behalf of the state is prosecuted

[356] Schmitt, 1996: 57
[357] ICC-ASP/6/20/Add.1, 2010: 4
[358] International Criminal Court, 2010: 125

for the crime of aggression. This has allowed the continuation of the Friend/Self and the Enemy/Other politics to be conducted by the powerful states, while the disagreement within the Security Council has blocked the cases of the crime of aggression to be referred to the ICC.

To conclude, the political objectives sought by the powerful states installed the Friend/Self and the Enemy/Other dichotomous framework, as species of politics, into the legal doctrine of the crime of aggression. This action would legalise the use of force conducted by the Friend/Self, and outlawing any violence from the Enemy/Other. This tends to collide different political communities where participating parties are inherently unequal[359]. Hereby, one could argue, that the aim of the historical development of the crime of aggression was not to neutralize the political arena where political actors would be equal. In order to prevent this from happening reversing the paragraphs (1) and (2) of Article 8 *bis* would serve more justice making states responsible for the crime of aggression, because the political leaders act on behalf and represent the state. Otherwise, power politics will prevail and even deepen the escalation of violence, i.e. crime of aggression, through legal means. In which case the Friend/Self and the Enemy/Other dichotomous politics will continue to manifest in the international legal system.

[359] Schmitt, 1996: 35

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